Divorce and Family Mediation Research Study

in Three Canadian Cities

Department of Justice Canada
Ministère de la Justice Canada

Family Law Research
Recherche en droit de la famille

Canada

DIVORCE AND FAMILY MEDIATION RESEARCH STUDY IN THREE CANADIAN CITIES

A REPORT PREPARED FOR

DEPARTMENT OF JUSTICE CANADA

Principal Investigator: C. James Richardson

Principal Researchers : Lorna Doerksen (Saskatoon)

Marie Kennedy-Levesque (Montreal)

Grace Ollerhead (St. John's)

Deborah Sherrard (St. John's)

Judith Wood (Ottawa)

J & J Research Associates Ltd. Fredericton, New Brunswick

April 1988

90-02959/

The views expressed in this report are solely those of the author and do not necessarily represent the views or policies of the Department of Justice Canada.

Published by authority of the Minister of Justice and Attorney General of Canada

For additional copies:
Communications and Public Affairs
Department of Justice Canada
Ottawa, Ontario
K1A 0H8

(613) 957-4222

Également disponible en français sous le titre:
Étude sur la médiation des divorces et des questions familiales dans trois villes canadiennes

Catalogue No. J2-80/1988E
ISBN 0-662-16122-X

© Minister of Supply and Services Canada 1988

Reprinted 1989
Printed in Canada

JUS-P-496

TABLE OF CONTENTS

ACKNOWLEDGEMENTS i
EXECUTIVE SUMMARY iii
Introduction iii
Research Design iv
Process Issues v
Mediation Outcomes vii
Social Impact Issues x
Conclusions xi

PART I: INTRODUCTION 1

PART II: ISSUES AND CONTROVERSIES 7
INTRODUCTION 7
THE BACKGROUND 8
THE CASE FOR DIVORCE MEDIATION 12
Children, Divorce and the Uncoupling Process . . . 13
Scope of the Problem 16
Problems in Studying Children in Divorce 17
Children's Experience of Marital Breakdown 20
CURRENT ISSUES 24
Economic Consequences 24
Custody and Parenting 28
Patterns of Custody 29
Joint Custody 30
SUMMARY OF EVALUATION ISSUES 35

PART III: DATA SOURCES AND METHODOLOGY 40
OVERVIEW 40
ORGANIZATION OF THE RESEARCH 41
CASE ANALYSIS STUDY 43
CLIENT INTERVIEW STUDY 46
OBSERVATIONAL STUDY 48
SUPPLEMENTARY STUDIES 49
The Lawyer Study 49
The Divorce Mediation Study 50
DATA PRESENTATION 51

PART IV: PROCESS ISSUES 55
INTRODUCTION 55
THE MEDIATION RESEARCH SITES 55
The Montreal Court 55
The Physical Context 57
The Legal Context 58
The Family Mediation Service 60
Intake 62
Pre-mediation 63
The Mediation Process 65
Mediability of Cases 65
Contested Cases: Mediators' Views 67
Mediating Finances 69
Interrelationship of Issues 72
Protection of Women's Rights 72

Interaction with the Legal System 73
The Mediation Service and Lawyers 74
The F.M.S.: A Proactive Service 75
The Saskatoon Court 76
History and Philosophy 76
The Physical Setting and Organization 79
Legal Arm 80
The Social Arm 82
Philosophies and Methods 85
Custody and Access Investigations 89
Public Education 91
The St. John's Unified Family Court 92
The Social Arm 94
DIVORCE MEDIATION IN CANADA 95
Professionalization 95
Aspects of Divorce Mediation in Canada 98
1) Training and Qualifications 98
2) Comparison Between Sites 101
Interaction Between Lawyers and Mediators 105
Family Law Practitioners: General Impressions . . . 107
Mediators and Lawyers: A Clash of Cosmologies? . . 112
THE NATURE OF MEDIATION AND NON-MEDIATION CLIENTS . . . 118
Income 118
Employment and Occupational Status 119
Education 119
Home Ownership 120
Other Characteristics 120
Nature of Separation 120
Alleged Grounds for Divorce 121
Issues Initially in Dispute 122
CLIENT PERCEPTIONS OF DIVORCE MEDIATION 123
Settlement Rates 128

PART V: THE OUTCOMES OF DIVORCE MEDIATION 130
INTRODUCTION 130
MAINTENANCE AND COMPLIANCE WITH MAINTENANCE ORDERS . . . 130
ECONOMIC ASPECTS OF DIVORCE 131
Relative Economic Levels 131
Economic Hardships 132
Reducing Economic Hardships 133
Lump Sum Payments 133
Maintenance Quantum 134
Maintenance and Family Size 135
Maintenance and Income 136
Maintenance and Standards of Living 138
Actual Impact of Maintenance on Standards of Living 140
Compliance With Maintenance Orders 141
Perceptions of Economic Consequences 143
THE IMPACT OF DIVORCE MEDIATION 146
Comparisons Between Sites 149
Impact of Mediation on Reducing Economic Hardship . 151
Mediation and Compliance with Maintenance Orders . 152
Mediation and Durability of Settlements 152

CUSTODY AND ACCESS 153
General Patterns of Custody 153
Disputed Custody 155
Mediation and Patterns of Custody 158
Attitudes About Custody 161
Access Arrangements and Orders 163
Access in Practice 166
PARENTING AND DIVORCE MEDIATION 168
Relationships Between Ex-Spouses 168
MEDIATION AND LEGAL PROCESSES 172
Legal Representation 172
Legal Costs and Mediation 173
Impact of Mediation on Court Process 174
Time Between Filing and Final Settlement 175
Client Perceptions of the Legal Process 177

PART VI: SUMMARY AND CONCLUSIONS 179
OVERVIEW 179
SUMMARY OF FINDINGS 181
Social Impact Issues 181
1) Promotion of Reconcilation 181
2) Women and Mediation 182
3) Impact on the Legal Profession 185
General Outcomes 186
1) Impact on Court Process 186
2) Impact on Clients and Children 189
CONCLUSIONS AND DISCUSSION 190

LIST OF TABLES

Table 3.1 Distribution of Cases by Type of Case and Research Site..... 46

Table 3.2 Distribution of Client Interviews by Type of Case and Research Site..... 47

Table 4.1 Work Settings of Mediators 98

Table 4.2 Mediation Approaches 99

Table 4.3 Lawyers' Assessments of Qualifications of Divorce Mediators 100

Table 4.4 Views on Most Appropriate Background for Divorce Mediators 100

Table 4.5 Distribution of Caseload 101

Table 4.6 Categories of Divorce Mediation Cases by Type of Practice 102

Table 4.7 Referral Sources for Divorce Mediation Cases by Type of Practice 103

Table 4.8 Estimates of Divorce Mediators of Case Outcomes by Type of Practice 104

Table 4.9 Lawyer Involvement in the Mediation Process by Type of Mediation 104

Table 4.10 Relationships with Lawyers by Type of Practice..... 105

Table 4.11 Main Advantages of Negotiation 111

Table 4.12 Circumstances Where Clients Would not Benefit from Divorce Mediation 111

Table 4.13 The Goals of Settlement: Average Rankings of Lawyers and Mediators 113

Table 4.14 Obstacles to Settlement: Average Rankings of Lawyers and Mediators 114

Table 4.15 Level of Agreement of Lawyers and Mediators About Advantages and Disadvantages of Divorce Mediation 116

Table 4.16 Monthly Income before Deductions of Mediation and Non-mediation Clients by Sex and Research Site 119

Table 4.17 Annual Income of Mediation and Non-Mediation Clients 119

Table 4.18 Age Structure of Children for Mediation and Non-mediation Clients 120

Table 4.19 Party Initiating Separation 120

Table 4.20 Use of Marital Offences and Marriage Breakdown as Grounds for Divorce, Canada and the Provinces, 1984 121

Table 4.21 Use of Marital Offences for Divorce by Research Site for Mediation and Non-mediation Cases 122

Table 4.22 Issues Initially in Dispute for Mediation and Non-mediation Cases 123

Table 4.23 Distribution of Reasons for Not Considering Mediation 123

Table 4.24 How People Learned About Mediation 124

Table 4.25 Who Suggested Going to Mediation 124

Table 4.26 Expected Outcomes of Mediation or Separation Counselling 124

Table 4.27 Advice to a Friend with a Family Law Problem by Mediation and Non-mediation 126

Table 4.28 Outcomes of Mediation 128

Table 4.29 Clients' Assessment of the Results of Mediation 129

Table 5.1 Percent Distribution of Men's and Women's Gross Monthly Income 132

Table 5.2 National Council of Welfare Estimates of Low Income Lines for 1986 133

Table 5.3 Proportion of Women and Children Living Below the Poverty Line by Family Size and Type of Case..... 133

Table 5.4 Type of Maintenance Award 135

Table 5.5 Amount of Maintenance per Child and Number of Children, Divorce and Separation Cases and in Total 136

Table 5.6 Proportion of Husbands Gross Monthly Income Paid in Maintenance 137

Table 5.7 Proportion of Women's Total Monthly Income Derived from Maintenance Award 137

Table 5.8 Distribution of Male Income After Maintenance Award is Deducted for Divorced and Separated Men 139

Table 5.9 Proportion of Women and Children Who Would be Living Below the Poverty Lines When Maintenance is Sole Source of Income 139

Table 5.10 Percent of Women and Children Living Below the Poverty Lines With and Without Maintenance Payments by Family Size 141

Table 5.11 Patterns of Maintenance Payments 142

Table 5.12 Changes in Maintenance Quantum and Enforcement Intentions 143

Table 5.13 How was Maintenance Quantum Determined 144

Table 5.14 Perceptions of Changes in Standard of Living by Sex 144

Table 5.15 Average Monthly Income by Research Site and Sex 147

Table 5.16 Amount of Maintenance per Month by Research Site 147

Table 5.17 Average Monthly Maintenance for Mediation and Non-mediation Cases for Various Income Levels 148

Table 5.18 Average Monthly Maintenance for Mediation and Non-mediation Cases by Type of Case and Level of Income 149

Table 5.19 Average Monthly Maintenance Received or Paid for Mediation and Non-mediation Cases by Sex and Type of Case 150

Table 5.20 Proportion of Women with Incomes Below the Poverty Lines for Various Family Sizes for Mediation and Non-mediation Cases 151

Table 5.21 Distribution of Legal Custody Awards 154

Table 5.22 Spouse Receiving Sole Custody by Sex of Petitioner 154

Table 5.23 Custody Outcomes by Sex of Petitioner 155

Table 5.24 Resolution of Custody Disputes 156

Table 5.25 Outcomes When Custody is Initially Disputed 157

Table 5.26 Custody Decisions Where Custody is Disputed 157

Table 5.27 Custody Outcomes by Method of Resolving the Dispute 158

Table 5.28 Type of Legal Custody Decision for Mediation and Non-mediation Cases 159

Table 5.29 Custody Outcomes for Mediation and Non-mediation Cases by Research Site (Case Analysis Data) 159

Table 5.30 Custody Outcomes for Mediation and Non-mediation Cases by Research Site (Client Interview Data) 160

Table 5.31 Physical Arrangements of Joint Legal Custody Cases by Mediation and Non-mediation 161

Table 5.32 Distribution of Access Orders 165

Table 5.33 Meaning Of Liberal or Reasonable Access 166

Table 5.34 Frequency of Contact with Children by Non-custodial Parent by Sex 167

Table 5.35 Present Relationship with Ex-Spouse by Sex and Mediation and Non-mediation 169

Table 5.36 Problems Identified by Women and Men About Access and Ex-spouse's Parenting for Mediation and Non-mediation 171

Table 5.37 Legal Representation by Mediation and Non-mediation Cases by Sex 173

Table 5.38 Estimated Average Legal Fees for Contested and Uncontested Cases ny Mediation and Non-mediation 174

Table 5.39 Length of Court Hearing for Mediation and Non-mediation Cases and in Total 175

Table 5.40 Average Number of Weeks Between Filing of Petition and Decree Nisi by Research Site 176

Table 5.41 Average Number of Weeks Between Filing and Court Order by Mediation and Non-mediation and Type of Case 177

Table 5.42 Feelings About the Court Hearing 177

ACKNOWLEDGEMENTS

Those who enter into contract research are often in the position of taking on projects involving concerns which, at least initially, they may never have thought about, or for that matter, cared about one way or another. This was, fortunately, not the case for me with respect to this particular research. To a large extent, and for better or worse, I was the one who, at the request of the Department of Justice, designed this project. I am in the unenviable position that I must blame myself and not some nameless bureaucratic if the original plan was less than perfect. I have, however, been in the enviable position of being engaged in the past two years in a project which, if not entirely a labour of love, has, certainly, been research which is central to my interests as an academic and applied sociologist.

In carrying out this ambitious and lengthy project, I have been extremely fortunate in having had an excellent and stimulating research team. As a writer, I hate the passive voice: I prefer to say that "I put the chemicals in the test tube" rather than "chemicals were placed in the test tube." And, ordinarily, I think that "we" should be left to Queen Victoria when, apparently, she was not amused. But, while this report has been generated out of my pen and word processor, for quite deliberate reasons, I use "we" throughout this report. I do so because I was blessed with a research team who, quite clearly, did not see this as simply another limited-term research project. Rather, as a group, we have, I think, had an exciting and sometimes controversial time. Thus, this is, in the end, very much a collaborative effort by a number of people more concerned about the issues and doing good research than about what was in it for them financially.

The four researchers consisted of Lorna Doerksen, in Saskatoon, Judith Wood, in Ottawa, Marie Kennedy-Levesque in Montreal and, at various points in the research, Deborah Sherrard, Kathy Alexander and Grace Ollerhead, in St. John's. In addition, Justin Levesque and Dale Albers served in a part-time capacity as consultants to the project. I am grateful to all of them but, in particular, to Lorna Doerksen and Marie Kennedy-Levesque, both of whom were with the project from beginning to end and who contributed immensely at all stages of the research including the writing of this report, especially the descriptive sections in Part 4. During the interviewing stage of this project, we were also assisted by a number of part-time interviewers, too numerous to mention. I thank them all for undertaking what was often a difficult and emotionally exhausting task.

This research would not have been possible without the cooperation of staff in the various courts. In Saskatoon, we would particularly like to thank Mr. Justice Dickson, Francine

D'Aoust and Betty Ann Potruff, all of whom assisted us at various stages in the research. In Montreal, we are especially indebted to Lorraine Fillion and Andre Murray who have both maintained considerable interest in the project and have taught us all a great deal about divorce mediation. Chief Justice Gold has also been very supportive of the research as he his of divorce mediation, generally, and we thank him for his cooperation. Mrs. Justice Noonan, of the St. John's Unified Family Court, has had a long-time commitment to finding less adversarial approaches in family matters and was once again very helpful and supportive with respect to this particular project. Carole O'Brien, the then court administrator, provided us with valuable information and assistance as did Rick Morris who has also left the St. John's Court. There were many others in all of the courts who gave freely of their time and their knowledge and we here express our appreciation of their less visible but essential contributions to this project.

We also have enjoyed an excellent and often stimulating relationship with the members of the Department of Justice who have been involved in this project. This project had much of its genesis in early discussions between the present author and Margot Haug and Glenn Rivard both of whom have continued to give valuable advice and encouragement even during times when they have been committed to other projects. We would also like to thank Wendy Bryans, who has administered the divorce evaluation segment of this project, both for her excellent advice and patience with our slowness in completing her part of the project. We are especially indebted to Ab Currie who, though administrating this project until very near its completion, has been spared the task of dealing with the final product, this report. He was an extremely efficient and capable administrator but we particularly thank him for his encouragement, his good ideas and, above all trust that the work would get done. Sylvie Gagnon, who inherited this project, has been a supporting and stimulating colleague and we are extremely grateful to her.

Finally, we are indebted to those people who must remain nameless: the divorced and separated men and women who let us into their homes and shared with us their experiences of a time in their lives most would probably prefer to forget; and we are equally indebted to the many lawyers and mediators who took time out of busy schedules to talk with us or to respond to our questionnaires.

EXECUTIVE SUMMARY

Introduction

The findings described in this report come from a two-year study of court-based divorce mediation and separation counselling in three Canadian cities: Saskatoon, Montreal and St. John's. In addition baseline data on divorce were collected in Ottawa. The research had three main objectives. The first was to conduct an evaluation of divorce mediation focussing on questions related to process, outcome and social impact. The second objective was to produce basic data on custody, access and maintenance for both divorce cases and those proceeding under the relevant provincial legislation. The third objective was to collect and report on baseline data for a future evaluation of the Divorce Act, 1985. It was with respect to this last objective that, part way into the project, the Ottawa court was added as a fourth research site. All data described in this report pertain to divorce and separation cases which were completed during 1985 or early 1986. Thus, all of the divorce cases proceeded under the previous divorce legislation, rules and procedures.

The main intent of the process evaluation was to provide a descriptive account of divorce mediation, its clients, and the relationship of this approach to the legal process and the legal profession. The outcome evaluation was, essentially, an empirical test of the claims of its proponents that divorce mediation a) has cost benefits to the state and to separating and divorcing couples through reducing the need for litigation of family law matters; b) reduces the hostility, pain and bitterness which are often claimed to be produced by the adversarial system; c) creates more amicable post-divorce relationships and encourages ongoing contact of both parents with the children of the marriage and, d) produces more durable and workable settlements and, in turn, lessens the need to return to court to vary or enforce the order. The social impact evaluation arose out of various concerns which, from time to time, have been expressed by various groups about possible latent or unintended consequences of divorce mediation. In particular, because women may have unequal bargaining power at the time of divorce or separation, there have been fears that they, and their children may fare worse, economically, when they mediate the settlement. Others have been concerned that mediation does not adequately protect people's rights and may undermine the role of the lawyer in the divorce and separation process. And, while not directly related to divorce mediation, there has, in recent years, been growing concern that the trend towards joint legal custody awards may not be in the best interests of women and children.

Research Design

The study is longitudinal in the sense that the research plan entailed collecting data from the court files on new or recently filed separation and divorce cases (the Case Analysis Study) and then interviewing a sub-sample of the couples about six months after the case was settled (The Client Interview Study). Six months was chosen in order to give people some time to adjust to the divorce or separation but to minimize mobility of people out of the jurisdiction. In addition, researchers in the three mediation research sites conducted observational studies of the court-based mediation and counselling services and the relationship of these to the court process and the legal profession (The Observation Study). Near the end of the project, researchers returned to the courts to determine what proportions of cases -- mediated and non-mediated -- had shown up again for enforcement or variation of the original order. In order to move beyond the three jurisdictions the research involved two supplementary studies. A sample of lawyers who have expressed interest in family law and who are members of the Canadian Bar Association were sent a mail questionnaire (The Lawyer Study) and a similar questionnaire was sent to those professionals included in the Department of Justice Inventory of Canadian mediation and reconciliation services (The Mediation Study). As part of the Lawyer Study, lawyers, in each of the three mediation research sites, who are frequent users of the family courts were interviewed.

In all, data were collected on 1773 court files, 905 divorced or separated women and men and, as a result of the two mail surveys, 220 lawyers and 219 mediators. Both divorce mediation cases and contested cases comprise a minority of all cases dealt with in family courts. For statistical and theoretical reasons, both are overrepresented since, generally, all of both kinds of cases were included in the sample. Included in the above totals were 363 court files in which the divorcing and separating couple attended mediation. At the interview stage, 324 individuals were interviewed who had used mediation to attempt to work out an agreement.

Throughout, outcomes of mediation cases are being compared with those cases which proceeded via the usual legal process. However, because, in publicly funded services one can neither deny people the service or, force them to use it, there was no control over who did or did not choose to mediate their settlement. There was not, in other words, random assignment of couples to the two groups of cases and there is, then, the problem of self-selection: those who choose mediation may differ in important ways from those who do not. To overcome this problem, the research design is quasi-experimental in that, where relevant, controls are introduced to determine whether an observed difference in outcomes is a result of mediation or of

the kinds of people who choose this approach to reaching a settlement.

On the whole, those who choose this alternative are somewhat better off financially, are somewhat better educated and are more likely to be employed in a white-collar occupation than are those in the non-mediation group of divorcing and separating couples. As a result, those who mediated their case, while as likely to be legally represented, were more likely to have used a lawyer in private practice than a legal aid lawyer. Aside from these differences, the two groups do not differ substantially. This is especially so with respect to the number and kinds of matters in dispute and the general contentiousness of the case and degree of hostility between the spouses. In sum, the main control which was introduced at various points was the income levels of men and women.

Process Issues

In terms of size of community, level of affluence of the clients served, scale of operation of the courts and types of services offered by the social arms of the courts, Saskatoon's and St. John's Unified Family Courts are quite similar. In both, mediation must compete with other functions such as intake, providing of basic information, some personal short term counselling and court-ordered custody assessments or investigations as they are variously called. Moreover, in both, mediation is limited to matters relating to custody and access.

In contrast, the Montreal Family Mediation Service is much more focused around a fairly structured approach to divorce mediation and was, in fact, set up with that explicit goal in mind. Custody assessments, for example, are dealt with in a different service entirely and, in general, the Montreal mediators are not caught up in the kinds of activities required of court workers in the smaller courts. While the scale of operation of the Montreal court completely overshadows that of any other court in the country, the mediation service, given the size of the population served (about one-tenth of Canada's population), is remarkably and proportionately, small. In Montreal there are seven mediators and in Saskatoon and St. John's four and a half and three and a half, respectively. In short, the Montreal service would have to be expanded ten-fold if it was to offer the same level of access as is possible in the smaller centres.

However, what particularly sets the Montreal service apart from the other two studied is that, ordinarily, maintenance and property division, as well as custody and access, are mediated. Another unique feature is the lawyer consultant who, though not directly involved in mediation, is available to both the couple and the mediator when advice of a legal nature is required. The

outcome evaluation data indicate that the combination of an explicit focus on mediation and the practice of mediating all four issues does result, generally, in outcomes superior to what was observed elsewhere.

Overall, at present, only about three percent of all divorce and separation cases passing through the courts are, in any way, affected by the existence of court-based mediation. In other words, even if mediation could be shown to have positive effects on court workload and the costs of processing cases, such services would have to be expanded dramatically for there to be any measurable improvement in either of these areas.

Observations in all of the courts suggest that, while judges frequently request a custody assessment, there is much greater ambiguity and uncertainty as to when it is possible or appropriate to refer contentious cases to mediation. At the same time, while lawyers interviewed and surveyed appear favorably disposed towards the concept of mediation and do not seem concerned about its possible impact on the legal profession or their livelihood, few routinely refer clients to either the court-based or private-practice mediation services in their communities though some do make a practice of referring people for personal counselling. Data from the court files and from mediators indicate that about 12 percent of mediation cases are referrals from lawyers. Given that lawyers estimate that over 95 percent of their cases do not go to court as contested cases, it is probably not surprising that few are referred; in most instances, lawyers are successful in negotiating a settlement.

Data from this study do much to undermine the stereotype of the litigious family law practitioner who exacerbates and creates additional conflict for spouses in the process of ending their marriage. Rather, there is a high degree of similarity between lawyers and mediators on a wide variety of attitudinal measures concerning the goals and obstacles in bringing about a settlement and the advantages to everyone of mediating or negotiating a settlement as opposed to having things settled in court in front of a judge. All of this suggests that the two professions are not as far apart as is often suggested or at least implied. Divorce mediation is an alternative, but not a diametrically opposed, approach available to couples who must deal with the issues and disputes associated with marriage breakdown

Client interview data confirm this conclusion. People interviewed in this study who had mediated their settlement were, generally satisfied -- and sometimes enthusiastic -- about the process and their mediator. But, at the same time, level of satisfaction with lawyers and the service they provided was equally high among both groups of clients. There were notable exceptions and a small minority who changed lawyers in mid-stream. But, it was also found that about three percent of those

who attended mediation also terminated the sessions because they found the exercise a waste of time or inappropriate to their particular situation. Nor was there any evidence from any data source of the expected clash between lawyers and mediators. In a large majority of cases, clients reported that their lawyer found no problem with the mediated agreement. And, what lawyers said in both interviews and the mail questionnaire does not suggest that mediated settlements are seen as technically incorrect or as undermining the rights of either party.

Given that one of the more contentious issues for most divorcing and separating couples is maintenance quanta and duration of the payments, it is of some interest that most lawyers surveyed, while believing that property division is best left to lawyers (or tax accountants), are of the view that maintenance should, if the case is to be mediated, be included along with custody and access.

Finally, fears that there are people offering divorce mediation who are not qualified seem to be without empirical foundation. Mediators who responded to the mail survey are well-qualified and come to the field with considerable experience in related areas. Lawyers surveyed and interviewed also view the mediators they have had contact with or are aware of as well-qualified to deal with the socio-emotional aspects of marriage breakdown though not necessarily well-trained in family law.

Mediation Outcomes

Data from the court files, mediators' estimates and clients' reports, when taken together, suggest that divorce mediation results in a full settlement in about 50 percent of cases and a partial settlement in another 15 percent of cases. Reconciliation, however temporary it may turn out to be, is the outcome in about six percent of all cases going to mediation.

In most respects, divorce mediation produces outcomes which are as good, and sometimes better, than those produced by a purely legal process. But, on a variety of measures, the differences between the two approaches are marginal and sometimes nonexistent. In the following paragraphs, the major differences, positive and negative, between mediated and non-mediated cases are briefly noted. In the process of doing so, some highlights of the baseline data on custody, access and maintenance are also outlined.

Overall, about 58 percent of divorced women and 71 percent of separated women, with custody of their children, have total gross incomes (including maintenance) which fall below the 1986 poverty lines for various family sizes. About 40 percent of men with legal custody of their children also have incomes which fall below these poverty lines. About 11 percent of divorced men and

28 percent of separated men who do not have custody of their children fall below the poverty lines for a single-person household.

Average maintenance agreed to or ordered by the court is $380.00 per month for divorced couples and $250.00 per month for separated couples. These amounts represent, on average, about 18 percent of men's gross income. The inverse relationship between level of income and proportion of income paid in maintenance, found in a number of American studies, is not so apparent in these Canadian data; men at various income levels tend, on the whole, to pay a roughly similar proportion of their income in maintenance. For women, with custody of the children, maintenance comprises, on average, about 40 percent of their total gross income and, in general, the lower the level of income, the higher the proportion of total income which is derived from maintenance.

If women (and their children) were to depend solely on maintenance payments, 97 percent would be living below the poverty lines for various family sizes. The general impact of maintenance payments is that, if the maintenance award is actually paid, the number of women living below these poverty lines is reduced from 75 percent to 58 percent. On the whole, maintenance awards do not adequately take into account family size: the larger the family, the less maintenance there is per child.

Contrary to some contentions, mediation has, in general, a positive impact on the economic situation of women and children following divorce and separation. Amount awarded or agreed to is, on average, higher by about $1200.00 to $1400.00 per year, depending on type of case, when the couple attended mediation. The overall impact of mediation on reducing economic hardship is, however, modest: it reduces the proportion of women and children living below the poverty lines for various family sizes by about four percent.

At the time of the interview, 29 percent of women reported that they were not receiving the maintenance payments ordered by the court or agreed to by the parties. In Saskatoon and St. John's, having attended mediation does not appear to have much effect on whether men will meet their maintenance obligations. Montreal is the exception: compliance is much higher in the mediation group (97 percent) than in the non-mediation group 67 percent).

The findings of this study are in accord with earlier research which shows that, in the vast majority of cases, women receive sole custody of the children. The major difference between the present findings and earlier analyses of Central Registry Data (by Statistics Canada) is that joint legal custody,

at 8.8 percent of all awards is more common than in the early 1980's. However, the over representation of mediated cases and contested cases in the sample inflates the proportion of joint custody awards. The data show that when custody is contested, there is a greater likelihood of a joint custody or split custody award than when the case is uncontested. Similarly, joint legal custody is a more common outcome when the couple mediate the settlement. This is especially so for Montreal, where about 47 percent of mediated settlements include an agreement for joint legal custody. In Saskatoon and St. John's, mediation is more likely than non-mediation to result in a joint custody agreement but the percentages are considerably lower than in Montreal. In general, there is considerable variation over the four research sites in the proportion of settlements which are joint custody awards: from 15 percent in Ottawa to four percent in St. John's. In 47 percent of cases there is a joint physical arrangement as well as joint legal custody.

Access arrangements were spelled out in quite specific terms in about 23 percent of all cases and in 46 percent of mediation cases. Overall, the most common award was "reasonable or liberal access." Client interview data suggest that this is defined or interpreted in different ways and that there is often uncertainty what such an order means in practice. The most common complaint about access is that men, as non-custodial parents, are not living up to their access obligations or do so inconsistently and unpredictably. Men in the mediation group tend, on the whole, to be more involved in parenting in the sense that they are slightly more likely than men in the non-mediation group to be living up to the access arrangement or are, in fact, seeing the children more often than was initially specified or agreed. Finally, while there are men who are not in contact with their children, this does not seem to be a result of the former wife denying them access.

At the time of the interview, about one-fifth of men and women reported problems or conflict over parenting and access. Those in the mediation group appear to be somewhat more in conflict than those in the non-mediation group, a result, perhaps of the fact that both parents are more likely to be involved in parenting and have a greater probability of coming into conflict. However, on a wide range of measures having to do with parenting and post-divorce relationships, little difference could be found between those who mediated their case and those who did not. At the same time, it should be noted that our data do not indicate the level of post-divorce conflict found in some American studies and, indeed, whatever else is felt to be wrong with the ex-spouse, his or her ability as a parent is seldom in question.

The data of this study indicate that mediation is not necessarily a less costly way to divorce or separate. On average, both men and women's estimates of legal fees are higher by about

$500.00 and $300.00 for those in the mediation group than those in the non-mediation group. Roughly the same differences persist for contested and uncontested cases. That is, having attended mediation and failing to reach a full settlement, clients paid more in legal fees than those with a contested case who dealt solely with lawyers.

Nor is there evidence that mediation has much impact on costs to the state of dealing with divorce and separation. The usual argument for mediation is that it reduces the number of contested hearings but this is not clearly demonstrated in these data: not everyone who attended mediation would have had a contested divorce or separation had they not done so and, conversely, some of those who tried mediation were later involved in a contested case. In terms of time in court, number of appearances and general case complexity, there do not appear to be any observable or measurable differences between mediation and non-mediation cases. Mediation does, however, reduce the length of time between filing of the petition and the final settlement. While this does not have apparent cost benefits to the state, it is a clear advantage to clients and, perhaps, their children; most clients found that a major source of pain and anxiety was the long delay between the beginning and end of the uncoupling process.

Except in Montreal, there was, by the end of the project, too few cases which had returned to the two smaller courts for it to be possible to comment on the impact of mediation on reducing the number of cases returning for enforcement or variation. In Montreal, at the time of the monitoring, 17 percent of non-mediation cases compared to just under four percent of mediation cases had returned to the court, a difference which suggests that mediation has, in this respect, at least, obvious cost benefits to both clients and the court. And, as noted earlier, there are indirect savings when, as in Montreal, maintenance is mediated; not only are maintenance quanta higher, there is a much higher level of compliance with the order or agreement.

Social Impact Issues

As the process and outcome evaluation both show, overall, divorce mediation does not lead to outcomes which are dramatically superior or different to those arrived at through the adversarial process. At the same time, the findings of this study do not give empirical support to the contentions of critics of divorce mediation most of which were considered in this research under the general rubric of social impact issues. As noted above, women and children fare better, economically and at all income levels when there is a mediated settlement, a finding which is especially true for Montreal, the one mediation service studied which offers mediation of financial and property matters as well as custody and access.

A second concern, that people's rights may not be adequately protected when they choose to mediate their separation or divorce is also without foundation. The court-based mediators studied in this research invariably stress the importance of clients' consulting a lawyer even if they do not intend to seek a divorce or a court order under provincial legislation. Indeed, some clients who attended mediation and were hoping to avoid the courts and lawyers were annoyed that until it was processed by their lawyers, the agreement they had reached in mediation was not a legally binding and enforceable contract. It is evident that most clients took the advice of the mediator and did consult a lawyer, before, during or after mediation and were as likely to be both represented at the time of their court hearing as those who did not attend mediation. And, while there is alleged to be concern in the legal profession about the quality of mediated settlements, lawyers, interviewed and surveyed in this study, did not express such concerns and, generally, have found few problems in agreements they have been asked to review and draw up as a separation agreement or minutes of settlement in a divorce petition. Nor, did these lawyers seem concerned that mediation undermines their role in family law cases or affects their livelihood.

While mediators evidently encourage couples to work out a joint custody arrangement, there is no evidence to suggest that women were "forced" into this because of fears that they would lose in a contested custody dispute. For most women with a joint custody order this had been their first choice. At the time of the interview, they were less satisfied with joint custody than were men but this would seem to be because their former husbands, though sharing in the parenting, were doing so less than equally. Nor was joint custody a trade off for a lower maintenance payment: women involved in joint legal custody arrangements but with de facto sole physical custody were receiving considerably higher levels of maintenance than the general sample of separated and divorced women in the sample.

Conclusions

With some few exceptions, the conclusion that can be drawn from this research is that mediation produces outcomes which are marginally, but not dramatically, better than those achieved through negotiation between lawyers and, for that matter, fighting things out in court. If as just described, the critics of this approach have vastly overstated their case, so have its proponents; the claims of both are more polemical than empirical.

Another, and admittedly, more speculative alternative is that both are correct but that they describe an era in family law which no longer exists or which, perhaps, never did exist in quite such extremes in the Canadian, as opposed to the American, social, cultural and legal context. On the one hand, divorce

mediation, virtually unheard of a decade ago, has gone through its growing pains and is well on the way to becoming fully professionalised. In undergoing that process, those in the field have been highly sensitive to criticism, and have, undoubtedly, addressed many of the concerns which may have had validity a few years ago. On the other hand, family law, procedurally and philosophically, has also changed dramatically, both at the federal and provincial level. And there is every reason to believe that the legal profession -- judges as well as lawyers -- have both precipitated but have also internalized these changes.

In short, divorce mediators are much more attuned to the reality that the outcomes of their efforts have a legal as well as a socio-emotional dimension. What is agreed to in mediation must meet the requirements of a legal contract but is also bound by what judges in each jurisdiction view as a reasonable, workable and just settlement. Mediators, then, are not likely to sanction agreements which will be rejected by lawyers or which judges find problematic. At the same time, family court judges, or at least the ones encountered in this project, have less and less patience with adversarial approaches, especially when the issues involve the welfare of children. They prefer that the couple try mediation or further negotiation or they order a custody assessment. Lawyers, in turn, again, at least the ones included in this study, are extremely aware that an overly litigious stance in court will not be appreciated by the judge. But, beyond fears of invoking the wrath of judges, who they must deal with daily, is that most lawyers practicing family law also believe that it is in everyone's best interest to avoid litigation whenever possible, especially in matters of custody and access. They, too, believe that, if the bottom line in all of this is the welfare of the children, traditional adversarial approaches are inappropriate, a view also shared by many of those experiencing marriage breakdown.

Failure to show dramatic differences in outcomes between mediated and non-mediated cases is not, then, a condemnation of divorce mediation. Rather, it suggests that family law has become a more humane system, one in which the goals and philosophy of mediators, judges and lawyers are more of a piece, less at odds than was perhaps true in the past. The field of divorce mediation has developed in and contributed to a divorce and separation regime quite different to the one depicted and castigated by the Law Reform Commission a decade ago. In the mid 1980's divorce mediation is no longer a radically new innovation juxtaposed against a traditional adversarial system. It would, then, be surprising if outcomes of mediated settlements were all that different from those achieved through the present adversarial system.

As this study has found, divorce mediation does offer a useful service to many separating and divorcing couples and those who have used this approach are highly satisfied with the process and the results. Moreover, court-based services do perform a number of other valuable services ranging from provision of information to post-divorce and separation counselling and mediation. This alternative is looked upon favorably by the courts and the legal profession and does seem to have become an integral component of family law administration, one which should continue to be supported and encouraged.

PART I: INTRODUCTION

All happy families, Tolstoy tells us at the beginning of Anna Karenina, are alike but an unhappy family is unhappy after its own fashion. Had divorce been more common and acceptable in his time, and had he been writing a different book, Tolstoy might also have felt compelled to comment on how similar are weddings and how different are marriage breakdowns. Marriage may bring tears, but usually these are tears of happiness. Divorce, marriage breakdown, generally, almost invariably means pain, bitterness, sadness and a violent upheaval in most aspects of people's lives; the process of becoming married has about it a certain degree of sameness and predictability, ending a marriage has elements of uniqueness and, invariably, personal tragedy for everyone involved. We begin this report on such a somber note because, once one enters the world of divorce and family law, marriage breakdown begins to seem the norm, it becomes routine and anticipated. And, in the process of research, the anguish and pain and the economic hardships become quantified, turned into means, percentages and cross-tabulations; in the process of analysis it becomes easy to forget that what are now the bare bones of statistics are a limited and partial description of this particular set of human tragedies.

Recent years have seen a growing interest in the development and encouragement of ways of ending unhappy marriages which minimize the social, the psychic and the economic costs. One such alternative to the traditional legal process is divorce mediation, the use of a neutral third party whose goal is to aid separating and divorcing couples to bring their marriage to an end with minimal pain and cost to everyone involved. Divorce mediation, or as it was previously called, conciliation counselling, is a new and only partially institutionalized approach to resolution of marital and familial disputes. It lacks the history and tradition of the legal process and, in some quarters, is viewed as either an unnecessary or even dangerous interloper into the area of family law. This report is essentially an evaluation of this new approach to dispute resolution.

The evaluation questions addressed in this report have their origins in a Discussion Draft prepared in August, 1984. That report drew upon a number of Law Reform Commission working papers and reports on family law, the evaluations of the four unified family court demonstration projects and other research on conciliation counselling and divorce mediation. Included, as well, were some discussions of the various concerns about the implications of non-adversarial approaches which, from time to time, have been expressed by the legal profession, various associations concerned with the status of women in Canada and groups concerned with the newer issue of fathers' rights. Finally, the Discussion Draft proposed a research design to

address the evaluation questions and general information needs of the Department of Justice, Canada with respect to future policy decisions about divorce and the economic situation of women and children following divorce.

In general, the report argued that while proponents of mediation are extremely enthusiastic about the alleged benefits of divorce mediation compared to traditional adversarial approaches, much of this optimism lacks empirical foundation and is often highly polemical particularly in its depiction, indeed, caricature, of the adversary system. However, even if the optimism about mediation and the criticism of the legal system is warranted, it was felt that there is still a need to know which approaches and which models of mediation are emerging in Canada and how this essentially American-influenced approach works in the Canadian cultural, social and legal context. And, while there seemed to be a lack of empirical evidence to back up the concerns which have been expressed about divorce mediation, it was also felt important for the research to explore the unanticipated consequences or outcomes of this approach to dispute resolution.

The conclusion of that report was that there is a need for an evaluation of divorce mediation, one which could focus on process, on outcome and on social impact. With respect to outcome, the questions centred on determining the relative effectiveness of divorce mediation in bringing about responsible and long-lasting settlements, reducing pain, bitterness and economic hardship associated with marriage breakdown, improving post-divorce parenting and, from the point of view of the state, improving the efficiency of family courts and compliance with maintenance orders.

At the same time, it was anticipated that a process evaluation could provide more systematic knowledge of how divorce mediation and separation counselling work, the various approaches in use and how such services interact with the legal profession and the court system. The social impact questions identified in the report centred on such matters as the implications of mediation for protection of people's rights, for the economic situation of women and children following separation and divorce, for the legal profession and for preservation of the family. But, above all, the central focus of the research--the bottom line--was a concern with the impact of mediation on reducing the impact of marriage breakdown on children.

There is now a burgeoning literature on divorce mediation, one which has expanded over the course of this research. As well as empirical or evaluative research reports, there are at least six books and countless articles by practising mediators enthusiastic about passing on their accumulated wisdom to would-be mediators or encouraging separating couples to attempt this approach to solving their problems. Thus, this research was not

conceived in a theoretical or empirical vacuum though the amount of Canadian research is still fairly limited. The best-known of the empirical studies--mostly American-- have either set up an experimental project or have tried to evaluate an existing service. As is described briefly in Part III, all of these studies have, despite their obvious contributions, inevitably suffered in one way or another from methodological problems and the limitations of doing research outside of the controlled conditions of the laboratory.

The present research does not overcome all of these methodological limitations. But it does differ from most other studies in the important respect that the goal of the research was to study mediation and separation counselling in a natural as opposed to an experimental setting and to view these processes in the context of the overall court process. Underlying this goal was a view that, in the area of family law, those who have concentrated on specific processes or outcomes, have often, and perhaps unwittingly, distorted the statistical importance of these phenomena. That is, such outcomes as joint custody or father custody or lump sum payments in lieu of maintenance are certainly of interest as are those who eschew the traditional legal process in favour of mediating a settlement or, for that matter, their opposites who use the legal system to its fullest and enter into protracted and costly custody disputes. However, while these are the aspects of marriage breakdown likely to receive most of the media attention, when put in the overall context, they are outcomes and process which occur relatively infrequently and raise the question of what are their implications for policy.

None of this implied that the research should attempt to be representative of all regions of Canada. But, it was felt that different sizes of communities and types of services should be represented and, where relevant, compared. It was further recommended that family courts chosen for the research be ones in which the mediation service or social arm was well-established and over the growing pains and effects of being an experimental project. Accordingly, once the proposal was accepted, the Department of Justice, Canada entered into negotiations with several provinces. The courts and services eventually selected are located in Saskatoon, Winnipeg, Montreal and St. John's. This report is concerned with research findings from three of the research sites. In the fourth research site--Winnipeg-- the work was carried out by two locally based researchers under separate contract and is reported separately. While the researchers asked essentially the same questions as just described, the organization and approach of the Winnipeg court necessitated a research design somewhat different from the present study.

In addition, it became apparent that the Divorce Act, 1985 was to be proclaimed at about the time this project was scheduled to begin. As a result, the divorce cases which were to be included in this research would be among the last to proceed under the Divorce Act, 1968. The research design was, therefore, modified so as to collect baseline data for a future evaluation of the new divorce legislation. An important part of this modification was to add the Ottawa court as a fourth research site. There, because of the lack of court-based mediation or counselling services, the research was almost solely confined to collection of baseline data relevant to the divorce evaluation component of the project. Thus, except for some analyses of aggregated data on divorce, this particular report is mainly concerned with the three original research sites.

The research findings reported here were generated from three basic research modules: an analysis of some 1800 divorce and separation files (The Case Analysis Study); interviews with 905 men and women whose files were part of the Case Analysis Study (The Client Interview Study); and qualitative and descriptive data developed out of researchers' formal and informal observations of mediation within each of the three courts (The Observation Study). In addition, where appropriate, we draw upon data from two supplementary studies. The first of these, The Lawyer Study, is based on 60 relatively unstructured interviews with lawyers in the three research sites who are regular users of the family court in their jurisdiction and a mail survey to members of the Canadian Bar Association who have expressed an interest in family law. This mailing yielded some 220 usable responses. The second supplementary study, The Mediation Study, is based on informal interviews with the court-based mediators and some private practice mediators and a mail survey to counsellors and mediators listed in the most recent Inventory of Reconciliation and Mediation Services compiled by the Department of Justice, Canada. In all, 219 people responded to this questionnaire. Finally, we monitored the initial sample of court files to determine how many have returned to court to enforce an order or to request a variation with respect to custody, access or maintenance quantum.

This project has generated a rather sizeable body of quantitative and qualitative data on a variety of aspects of the process of separation and divorce and the post-separation or divorce situation of those undergoing this generally unhappy and unpleasant experience. As the date of this report should indicate, it has taken somewhat more time than anticipated to collect, code and analyze these data and considerably more time than expected to digest and to synthesize the findings so as to sort for readers what is of greatest relevance with respect to the initial questions underlying the research. As we have learned, the ways couples legally end their marriage are complicated and varied. In studying those processes, it is easy

to be led down a variety of interesting by paths, to, in effect, become lost in a kind of maze. Augmenting this is that each of the researchers has come to know their court, their jurisdiction and their respondents situations with great familiarity. As good, and therefore curious and socially conscious researchers, they have found it impossible not to be drawn, to some extent, down some of the paths and by ways unique to their research site: the critical economic situation of civil legal aid in Saskatchewan and its impact on family law; the concerns of the Montreal Family Bar about divorce mediation; the impact in the St. John's court of personnel changes; more generally, the concerns in each of the courts about backlogs of cases and the resulting delays; the reports by women we interviewed about the violence and wife and child abuse which, for the most part, had been underlying but unspoken factors in the marriage break up; the intrigue which, as social scientists interested in the sociology of the family, we all felt with exploring the ins and outs of joint custody arrangements. Moreover, given the size and expense of this project, it was deemed important to, as it were, cover the waterfront, and ensure that, in particular, the interviewing stage could be used as profitably as possible both from the point of view of the policy concerns of the Department but also with respect to the general objective of building knowledge about post-divorce families in Canada.

Despite its length and the amount of data analyzed and described, we have sub-titled this report as "a preliminary analysis." We do so because of the many objectives contained within this project. The research design was developed to examine processes and outcomes--intended and unintended--of divorce mediation compared to purely legal approaches; to explore the relationship between mediation, the legal profession and the court system. Moreover, it was also expected to provide baseline data on custody and access and maintenance in general but as already noted, more specifically on divorce cases which had proceeded just prior to the new legislation coming into force. And, finally, as there are several research sites, there is, inevitably, a comparative dimension to the research as well as an understandable interest in results of the findings specific to each jurisdiction included in the project.

In analyzing our data and in deciding upon an approach, we have gained considerable sympathy with what we imagine to be the fundamental dilemma of cartographers: the larger the scale the greater the overall view but the less useful is the map for organizing a trip. Conversely, ordinance maps, though rich in detail, lack a sense of perspective--used alone, its hard to tell where we are at or will end up next. In this project, we face an analogous dilemma and to use the analogy for the last time, we have opted, mainly for a depiction of the "continent" and left for future publications the details we all appreciate from ordinance maps.

To put it another way, there are, in this body of data, a number of sub-themes which could lead to specific papers and, probably MA theses. As long as this report has grown to be, it is, to a large extent, a summary report in which we have tried to return to the questions set out in the original Discussion Report. It is hoped that as it is read, it will prompt questions and suggestions as to how the data might be used in more focused and, in some ways, more detailed future publications.

The rest of this report is divided into five parts or chapters. Part II reviews the issues of concern with respect to divorce and family mediation and some of the findings from social science research which underlie the rationale for non-adversarial approaches to marriage breakdown. As some of the concerns about family law and its administration have been addressed by recent changes in legislation and procedures, this first Part ends by briefly putting these into a more contemporary context. Part III describes the research design and data base for each of the research modules making up this project and for each of the research sites. In Part IV, the focus is on process issues. We begin with a descriptive account of the three courts and, in particular, their mediation service and approach. The next section of this Part looks at mediation in Canada more generally, the interaction of family law practitioners with court and non-court based mediation and the attitudes of both mediators and lawyers about mediation and divorce and separation. The remainder of this Part considers the characteristics of clients who did and did not choose to mediate their separation or divorce and describes what clients, themselves, had to say about their experience with mediation and the legal system.

Part V brings us to the heart of the research, an analysis and evaluation of the outcomes of divorce mediation, with particular reference to the economic situation of couples and their children, to custody and access, to parenting generally and the impact of mediation on various aspects of the court process. In the course of this analysis we also present the baseline data on maintenance custody and access which was one requirement of this particular contract. While analytically separate, this Part also considers what the data have to say with respect to the various social impact questions. This is because, to a large extent, these issues draw upon the same empirical base as the more explicit outcome questions and measures. Part VI, Summary and Conclusions, pulls together the most important findings and comments on the concerns of those who have identified unintended consequences of divorce mediation. Finally, some policy implications of the findings are outlined.

PART II: ISSUES AND CONTROVERSIES

INTRODUCTION

In Canada, divorce mediation, or as it was until recently called, conciliation counselling, emerged as one response to perceived inadequacies with traditional family law.[1] The result is that many of the concerns of the present study have their origins in these earlier criticisms of family law in Canada, its philosophy, its procedures and the structural complications which arise from a legal system which gives provinces responsibility for most family matters but leaves divorce as a federal issue. Over the decade of the 1970's, the then newly formed Law Reform Commission, prepared a number of working papers and reports which documented what were perceived as the main problems and inadequacies with family law and its administration and proposed several major recommendations for change. These ranged from the implementation of unified family courts across Canada to a major restructuring and re-orientation of the Divorce Act, 1968. At the same time, reform of the antiquated body of provincial Acts concerning separation, desertion and child protection was also underway in at least some provinces and resulted eventually in legislation which was fundamentally different philosophically and procedurally with what had gone before.

If there has been one growth area in the social sciences during the 1980's, it is in feminist research and women's studies. Nowhere has this been more evident than in the areas of justice, the sociology of law and legal research generally. Feminist perspectives have often wedded theory and practice with the result that there has been mounting pressure, backed, often, with solid research, that legislation be made more sensitive to the particular situation of women and that well-meaning reforms do not have the unintended consequence of worsening the already disadvantaged position of women in contemporary society. Thus, many of the issues and controversies surrounding divorce mediation and family law, generally, have emerged from and been articulated by this increasingly vocal and productive segment of the research community.

---

1 Throughout, we will be referring to divorce mediation rather than the older term, conciliation counseling. We do so partly for brevity and partly because the former has superseded the latter both in the literature and everyday usage. As we discuss in Part IV, there is, however, some controversy whether, in theory and practice, the two are synonymous or, in terms of goals and approaches are analytically separate.

This Part does several things. First, it reviews, briefly, the earlier concerns which led to the general policy of encouraging divorce and family mediation. Second, it summarizes, again briefly, the major social science research which forms the underlying theoretical and empirical rationale for this type of intervention in the uncoupling process. Third, it outlines the major issues which have emerged out of the more recent and mainly feminist research and thinking about family law reform and divorce mediation.

THE BACKGROUND

Most of the earlier criticisms and the proposed solutions were summarized in the Discussion Draft which forms the basis of this present research project[2]. As noted, then, a major theme running through these various critiques was the perceived failure of family law and its administration to keep pace with and respond to the broader changes occurring in the family and what seemed to be the changing conceptions and attitudes about marriage, family and divorce. For those writing in the 1970's, Meyer Elkin's earlier observation about the United States -- that family patterns had changed so dramatically as to make traditional family law "a reflection of another time, another age that no longer exists" -- seemed an apt depiction of on the one hand, Canadian family law and, on the other, the "fire storm of change" transforming the supposedly venerable and enduring institutions of marriage and family[3].

One obvious reality was that, during the 1970's and early 1980's, Canadian divorce rates rose precipitously and in their wake were creating a variety of family forms[4]. While the

---

2 C. James Richardson, A Proposal for Evaluation of Reconciliation and Conciliation Counselling in Canada, Ottawa: Department of Justice, Canada, 1984.

3 Meyer Elkin, "Conciliation Courts: The Reintegration of Disintegrating Families", The Family Coordinator, 22 (1) January, 1973, p.64

4 In the year preceding the Divorce Act, 1968, the divorce rate was 54.8/100,000 people. In the year following, the rate rose to 124.2/100,000 population and continued to rise to a peak of 285.9/100,000 in 1982. By 1985 the rate had fallen to 244.4/100,000. Since 1986, the year in which the new divorce legilsation came into force there has, again, been a sharp increase in the divorce rate. It is assumed that this is a short term increase brought about by the much shorter waiting period which is a major feature of the new legislation. See: Marriages and Divorces Vital Statistics

traditional nuclear family was still, statistically, the norm, it was becoming increasingly apparent that, through choice or circumstance, a significant number of Canadians were now living their lives in other kinds of familial arrangements. The single parent family began to take on particular prominence, but there was also growing interest in other kinds of family forms which develop in the aftermath of divorce: remarriage families, blended families, bi-nuclear families and other terms were coined in an attempt to capture the essence and complexity of these new arrangements[5]. Increasingly, then, as Margrit Eichler maintains, neither theory nor social policy could any longer be based on a monolithic bias about the family.[6]

At the attitudinal level, there was also evidence of changing views about divorce. In the 1950's and 1960's, divorce was most often viewed as disastrous, a singular event which undermined and destroyed the family. Children of divorce were usually depicted as "products of broken homes", victims to be pitied. However, during the 1970's there was, if not an actual romanticizing of divorce, at least a new view of it as potentially a creative, rehabilitative and liberating process.

As was noted in one Law Reform Commission working paper:

> ....divorce may provide a constructive solution to marital conflict. It should not be regarded as totally dysfunctional and prejudicial to the institution of marriage. Many divorcees enter into successful second marriages. Divorce can therefore provide an

---

Volume II, 1985, Statistics Canada.

5 See, for example, C.R. Ahrons, "The Bi-Nuclear Family: Two Households, One Family", Alternative Life Styles, 2 (4), 1979. Much of this literature is summarized in Penny Gross, Kinship Structures in Remarriage Families, unpublished Ph.D. Thesis, University of Toronto, 1985. See also Andrew Cherlin, "Remarriage as an Incomplete Institution", American Journal of Sociology, 84 (3), 1978 pp. 634-650 and his Marriage, Divorce, Remarriage, Cambridge, Mass., Harvard University Press, 1981.

6 Margrit Eichler, Families in Canada Today, Toronto: Gage, 1983.

opportunity for the creation of new homes for ex-spouses and their children and hold out the prospect of a new and viable family unit.[7]

Divorce, in other words, was not so much seen as a problem but as a possible solution for some unhappy marriages. Connected to this new conception of divorce was the belief that the state should not be attempting to buttress failed marriages or to put legal and administrative obstacles in the way of those seeking a legal resolution of their marital difficulties. Divorce, in other words, had lost much of its former stigma and while conventional marriage and the nuclear family had not lost favour with most people, there was, at the same time, a seemingly greater tolerance of alternative family forms and family life styles.[8]

Finally, we also saw in the various attempts at family law reform, the emergence of a much broader and less conventional view of what is meant by family and what it means to preserve and strengthen it. Implicitly, and sometimes explicitly, there was recognition that, where children are involved, the "clean break" approach advocated in the 1950's and 1960's was inappropriate; marital dissolution should not mean complete family dissolution since separated or divorced spouses still have ongoing parental responsibilities which are vital to the well-being of their children. Thus, then newly coined terms such as the "bi-nuclear" family were meant to capture the view that divorce does not end parental relationships it changes them and creates more complicated family structures and family relationships and that continuing contact between divorced spouses does not necessarily indicate a pathological attempt to cling to a now dead marriage.

But, while the long-term effects of marriage breakdown were not seen necessarily as disastrous as had earlier been depicted, it was recognized that the short term effects are often psychically and emotionally traumatic for those going through the uncoupling process. And, there was growing concern that the existing legal system did little to minimize the pain and suffering. As one commentator noted, family litigation is distinguished from other civil actions in that it involves a much greater emotional element and that dissolution of marriage

---

7 Law Reform Commission, Divorce, Ottawa: Information Canada, 1975, p. 32.

8 See, for example, Julien Payne's recent paper, "The Evolution of Family Law in Response to Changing Family Structures with Special Regard for Spousal Support", Canadian Law and Society Meetings, Hamilton, 1987. For a more general discussion and a more conservative set of conclusions, see Peter and Brigitte Berger, The War Over the Family, New York: Basic Books, 1984.

requires different procedures than those that "suffice for recovery of damages for breach of a commercial contract or reparation for forcible aggression upon person or property".[9]

Fault can be found, in any body of law, in terms of its philosophy and its procedures. At the philosophical level, the main problem identified was the use of the adversary approach in family law cases, what at one point the Commission depicted as "one of Canada's great self-inflicted wounds" and as a weapon which should not be available to spouses who disagree over their personal relationship.[10] As the Commission argued, adversarial approaches are inappropriate, intensify pain and bitterness and impede the possibility of an amicable settlement. However, the Commission was equally opposed to the fault-orientation of the existing legislation which, in its view, was seen as seldom relevant in marriage breakdown because the grounds for divorce and the reasons for divorce are usually quite far apart. People are often forced to fabricate grounds and this exacerbates an already conflictual situation.

At another level, what might be called the procedural or, perhaps, structural level, the Commission also was concerned about the lack of resources and services to deal with the social and emotional problems associated with marital dissolution. At the time, in many provinces there were family courts which were offering legal, informational and counselling services. But, since divorce cases were heard in superior courts and by judges who generally did not specialize in family law, divorce was almost purely a legal process with virtually no supporting services.

It was for this reason that the Commission advocated the development and implementation of unified family courts. Unification meant, first of all, the establishment of specialty courts presided over by superior court judges with comprehensive and exclusive jurisdiction over all family matters. Second, such courts would offer an array of services including information and intake, counselling and mediation, legal advice, custody assessments and enforcement of maintenance orders. Such services, particularly the social arm, would, it was hoped, complement the judicial side of the court and, through the use of counselling and mediation, seek to achieve non-adversarial resolutions of family disputes and, wherever possible, divert matters from formal court hearings.

---

9 Quoted in Julien Payne, A Conceptual Model of Unified Family Courts, Ottawa: Law Reform Commission, 1973, p. 62.

10 Law Reform Commission, Report on Family Law, Ottawa: Information Canada, 1976, p. 16.

Divorce mediation and separation counselling were given a central place in this restructuring of family law and its administration for at least two basic reasons. First, such services were viewed as the most effective way to avoid the supposed negative effects of the traditional adversarial system. Second, the Commission saw in the provisions of such services a way for family law to meet its more general objective of preserving the traditional family through reconciliation counselling and, through separation counselling, to improve relations among family members following marital dissolution.

THE CASE FOR DIVORCE MEDIATION

Divorce mediation, or more generally, conciliation counselling, either within the courts or near by in the community, was, then, increasingly seen as the best means to redress the emotional and financial costs of the adversary system. If not exactly a panacea for all of the problems of family law, it was, at least, an approach which many felt should be available to all separating and divorcing couples and some went so far as to argue that mediation should be mandatory where couples cannot agree on how to end their marriage. In general, proponents of the approach have, over the years, argued that mediated settlements are more long-lasting and better protect children's interests than those imposed by the court through the adversarial approach. Through divorce mediation, it is argued, people are able to create settlements which they can live with and which keep them from returning to the court for enforcement or variation of custody, access and maintenance orders. Thus, as noted in the Discussion Draft, divorce mediation has been extolled as both a humane and cost-efficient approach to dispute resolution. It is more humane than traditional approaches because, according to its proponents, it:

a) provides a more therapeutic approach to familial and marital disputes;
b) reduces rather than exacerbates the pain and bitterness associated with marriage breakdown;
c) protects children's interests;
d) produces more amicable settlements;
e) encourages former spouses to recognize and accept their ongoing role and responsibility as a parent.

Cost benefits arise because mediation:

a) reduces court costs and court time because there are fewer contested cases;
b) reduces client costs resulting from lengthy negotiation
c) reduces costs resulting from people returning to the court for enforcement or variation of orders;
d) reduces default on maintenance orders.

Children, Divorce and the Uncoupling Process

The merits of these claims for mediation remain to be tested and are, of course, a major theme of this present research. However, in developing their case and in demonstrating the need for divorce mediation, advocates of this approach have been able to draw upon a growing literature on the uncoupling process and the aftermath of divorce and its impact on family members, particularly children. Until the 1980's, family law in Canada distinguished quite clearly between men and women -- fathers and mothers -- with respect to support and, for the most part, custody. Fueled in part by the growth of Father's Rights groups, recent family law in both the United States and Canada has been cast in gender-neutral language and has, in turn, put greater emphasis on joint custody or shared parenting as most prefer to think of it. Advocates of joint custody have also been able to call upon a growing body of research which suggests that this is one way to minimize the impact of marriage breakdown on the children involved. In the following paragraphs, we briefly review some of this literature, particularly as it pertains to the potential for divorce mediation to improve the situation of people during and in the aftermath of marriage breakdown.

As noted earlier, in recent years there has been a tendency to romanticize divorce as a creative, rehabilitative and liberating process. It may often be all of these things. But, most of the evidence suggests that whatever the final outcome, it is initially disruptive for at least some, if not all, family members. The fact, for example, that the actual divorce hearing is, for most people, not the protracted and highly emotional "Kramer vs Kramer" situation, but a rather ritualistic formality taking less than 15 minutes, often hides the amount of prior anguish, hostility, fighting and negotiation which preceded it; the divorce hearing is often the tail end of a long and highly disruptive uncoupling process.

It is, then, probably safe to say that virtually all divorces involve some degree of stress, pain and a difficult period of adjustment. Indeed, some sociologists have likened the stages of divorce to the stages of dying as set out by Kubler-Ross: 1) Denial; 2)Anger 3) Bargaining; 4) Depression and 5) Acceptance.[11] In sociological terms, divorce, like the transition from "patient-who will-get-well" to "terminal patient" is a status passage, a change in status or role with rather predictable stages to go through. As Ann Marie Ambert describes it, "divorce is a normal process with specific tasks to be mastered, recognizable stress to be dealt with and satisfaction

---

11 Elizabeth Kubler-Ross, On Death and Dying, New York: Viking Press, 1969

and goals to be sought for".[12] No doubt, at some general level, Ambert is correct: most of what people do and fail to do during the breakup of their marriage is unoriginal and is rather predictable. But, marital breakdown and family dissolution, from the point of view of those involved, probably never seems normative, is never a routine event. In the immediate aftermath of the decision to end the marriage, it seems, for example, to matter little who initiated the divorce.; both find their lives disrupted and both are likely to experience a variety of conflicting emotions ranging from feelings of rejection, anger and bitterness to an ambivalent sense of relief that an unhappy, perhaps intolerable, relationship has ended.[13]

Spanier and Casto suggest that there are two distinct but overlapping adjustments divorcing and separating couples must make. The first are the adjustments to the dissolution of the marriage. These include the practical aspects of the legal process, informing people in one's social world about the change and, second, dealing with the new emotions.[14] As well, people must adjust to the process of setting up a new lifestyle. Women who seemed to have no other role in life but mothering may now be coping with the unfamiliar role of becoming a breadwinner and of acting economically independent. Others may be going through the anxiety of returning to college or university, a difficult enough transition for most adults whatever their marital situation. Both parents may also be re-entering the dating and marriage market, returning to and developing, however awkwardly, uncomfortably and self-consciously, sides of themselves which they never expected to resurrect again in their lives. And, as Robert Weiss notes, the first year will be a period of intense ambivalence. "Individuals who have shared in the decision to separate may alternate between deep depression accompanied by lessened self-esteem and euphoria accompanied by heightened self confidence and in each state feel that the other state was a temporary mood."[15]

---

12 Ann Marie Ambert, Divorce in Canada, Toronto: Longman Canada, 1980, p.10.

13 Andrew Cherlin, Marriage, Divorce, Remarriage, Cambridge, Mass: Harvard University Press, 1981.

14 G.B. Spanier and R.F. Casto, "Attachment to Separation and Divorce: A Qualitative Analysis", in G. Levinger and O. Moles, Divorce and Separation: Contexts, Causes and Consequences, New York: Basic Books, 1979.

15 Robert T. Weiss, Marital Separation, New York: Basic Books, 1975.

There is a good likelihood that conflicts which precipitated the divorce carry over into post-divorce relationships. Kenneth Kressel, after reviewing the now considerable research on post-divorce families concludes that "the first post-divorce year is clearly terrible for nearly all couples."[16] And, he is able to cite evidence that high levels of conflict persist well beyond the first year. Default on maintenance payments is one tangible indicator of conflict but arguments about parenting and visitation appear to involve an even larger proportion of divorced couples. Thus, even in studies which have focused on couples at the low end of the conflict spectrum find that from 20 to 40 percent of divorced couples are dissatisfied with access and visiting arrangements and communication about parenting and are at times in outright conflict. Kressel's reading of the evidence is that anywhere from 20 to 50 percent of divorced couples have been unable to work out satisfactory post-divorce relationships. He concludes that:

> ...a basic fact is clear from the high degree of general agreement among the reported studies, which are otherwise so heterogeneous in their samples, method and points of focus: for a great number of divorced persons the process of separation and the settlement negotiations which accompany it fail to produce enduring, mutually acceptable agreements. They also fail to create a more positive climate of cooperation and trust, especially concerning co-parenting.[17]

The question, of course, is whether different approaches to reaching a settlement and to uncoupling, generally, such as mediation, can lessen the level of conflict in the post-divorce family. The matter is clearly of considerable importance since however unhappy and stressed are the adults, the hapless casualties of these conflictual situations are the children of the divorce or separation. Whatever other alleged benefits divorce mediation may offer -- reduced court workloads, lower costs to clients and the state and so forth -- policy initiatives encouraging this approach could be justified if, through mediation, children had a better chance of "surviving the breakup." In the final analysis, divorce becomes a social problem, one requiring some intervention of the state when children are involved and, indeed, virtually all of the research done on divorce has focused almost exclusively on marriage breakdown where there are children. In the following paragraphs, we consider, briefly, what is and is not known about children in divorce.

---

16 Kenneth Kressel, The Process of Divorce, New York: Basic Books, 1985, p.15

17 Kressel, pp. 23-24.

Scope of the Problem

As the divorce rate continues to remain high in most western societies, more and more children will go through the breakup of their parents' marriage. While divorce rates in Canada(and the United States) have levelled off and even abated, at least temporarily, about 70,000 divorces occur annually. About half (48 percent) of these involve dependent children which means that each year, around 55,000 children will be directly affected by their parents' divorce.[18] To these figures must be added the number of separations and desertions which occur under provincial jurisdiction and are not, therefore, picked up in the federal divorce statistics. As McVey and Robinson point out, reliance on divorce statistics alone, seriously underestimates the actual rate of marital dissolution in Canadian society. Their conservative estimate is that this rate is about double what the divorce statistics tell us. Probably the number of children affected annually in Canada by marriage breakdown is much closer to 100,000.[19]

Admittedly, this figure pales in comparison to the estimated two million children per year who go through the divorce experience in the United States. National studies of the life course of children suggest that from one third to two-fifths of American children will spend at least part of their lives not living continuously with both biological parents.[20] Glick, an American demographer, estimates that by 1990 this figure will be closer to 50 percent.[21] Children have, of course, always been at risk of family dissolution and of spending part of their lives in a single - parent family. Indeed, demographers tell us that the rate of family dissolution hasn't changed much over this century only the causes have changed: what was brought about in earlier decades by the early death of one parent is now caused by the breakdown of the parents' marriage. At the same time, death and divorce, while bringing about the same change in family

---

18 Statistics Canada, Divorce: Law and the Family in Canada, pp. 96 and 145. Margrit Eichler, Families in Canada Today, suggests that about 55 percent of divorcing couples have dependent children.

19 Wayne W. McVey and Barrie W. Robinson, "Separation in Canada: New Insights Concerning Marital Dissolution", The Canadian Journal of Sociology, Vol 6 (3), 1981, 353-366.

20 Frank Furstenburg et al., "The Life Course of Children of Divorce", American Sociological Review, 48 (5), 1983, 656-668.

21 Paul C. Glick, "Children of Divorced Parents in Demographic Perspective", Journal of Social Issues, 1979 (35), 170-182.

structure, are not likely to be viewed as the same thing by children or have the same kinds of consequences. Loss of a parent through death is obviously painful but it is at least something over which we have no control.

Problems in Studying Children in Divorce

Small children, more than anyone else, live their lives in the circumscribed world of the family. So, intuitively, we expect changes in its patterns or structure to have a momentous impact on them and their lives. Marriage breakdown obviously begins a process of major restructuring of the family and a bewildering array of alternatives. There is, first of all, the transition from living in a nuclear family with two parents to living in a single parent family, often with a substantial reduction in standard of living. For some children there will also be a sense of abandonment when one parent--usually the father--becomes absent. Others must learn to cope with the tension and awkwardness of now having a "weekend" father. A minority will go through the as yet little - known experience of alternating between two homes and two diverging lifestyles as a result of a joint custody arrangement. And for many children there is the likelihood that they will acquire one or more stepparents as their parents make the shift from divorce back into marriage.

Researchers have put considerable effort into assessing the impact on children of divorce and separation.[22] Despite an intuitive sense that the breakup of the parents', marriage should have momentous and easily observable consequences for children,

---

22 With some simplification, it could be said that this research falls into several related categories or areas of inquiry. First, a sizeable body of research has sought, but quite unsuccessfully, to demonstrate that divorce is a direct cause of a number of emotional, cognitive and behavioral problems in children. These include such things as retarded emotional development, poor school performance, delinquency and discipline problems. A second and closely related body of research is what has come to be called the "father absent" literature. Since most separated or divorced families are headed by females, there has been considerable effort devoted to determining the consequences for children of growing up without a father or alternative male figure. Another body of research has been concerned with describing children's experience and their feelings about divorce and with assessing the various factors associated with their adjustment to this important change in their lives. Finally, researchers have been concerned with the more easily measured and obvious economic consequences that follow from marriage breakdown, and the impact that these have on the subsequent life chances of children.

it turns out to be extremely difficult to generalize about the aftermath of divorce and separation. Rather, those doing research in this area have been unable to demonstrate conclusively that children suffer measurable short -term or long - term detrimental effects directly attributable to either the process of divorce or living in a single parent family afterwards.

After reviewing the literature on divorce outcomes, Anne Marie Ambert, a York University sociologist, concludes that there are really two major branches of literature, on divorce, the sociological and the psychiatric. She suggests that the findings from sociological research are, on the whole, more positive and paint a less gloomy picture than those which are generated from clinical research. The reason for the difference is that, by definition, people seen by clinicians are those with specific problems of one kind or another. In contrast, sociologists will usually have studied a more representative cross - section of divorcing or separating families. A case in point, is the widely cited longitudinal study by Judith Wallerstein and Joan Kelly, Surviving the Breakup. As important as this study is, we cannot be sure that what they have found applies equally to all divorces because the authors obtained their respondents by promising counselling over a five-year period. It is likely, then, that the parents and children they studied would be skewed toward the distressed end of the divorce population.[23]

Whatever the source of the research, the major problem in determining the effects of divorce on children is that it is extraordinarily difficult to sort out what is an effect of divorce per se and what is the result of other factors. In particular, we can expect that prior to actual separation there will usually have been considerable marital discord. Although it seems children are sometimes not aware of this, or of the magnitude of conflict between their parents, there remains, nevertheless, the question of whether it is the experience of having lived in an unhappy family or the breakup of their parents' marriage which is the crucial factor.

Ann Goetting, after reviewing the literature, concludes that it is the former: family discord is a more important determinant of various kinds of negative effects in children than the change

---

23 Judith Wallerstein and Joan Kelly, Surviving the Breakup, New York: Basic Books, 1980.

in marital structure.[24] She cites a number of studies which suggest that the most detrimental situations for children are unhappy intact homes. On most measures, children from divorced homes, in fact, fall somewhere between those from unhappy intact homes and those from happy intact homes. This suggests that divorce may, overall, have positive not negative effects.

Another complicating factor in understanding what the impact of divorce is, exactly, is the psychological state of the divorcing parents. Kelly, in her recent research, has found that on a variety of measures, divorced couples fall mid-way between a normal population and a population of people who have been admitted to a psychiatric hospital.[25] Follow-up measures, taken two years later, show on average, a movement back to normal. The question is, of course, which is cause and which is effect? Does the experience of divorce make people more psychotic or, are people who are relatively psychotic more likely to become divorced? Whichever is true, it is apparent that for a time children must cope not only with a changed family structure but also with being parented by people who may be on the borderline of becoming psychotic. We cannot, then, conclude that divorce, itself, is a crucial factor in creating problems for children.

There is, as well, a tendency to exaggerate the importance of the intact nuclear family and to assume that any disruption of that pattern will be detrimental to children. This is especially evident in the large body of research which has concentrated on the impact of father absence on children. This focus is understandable because,in the majority of divorces and separations, children are, in fact living with their mothers and in many instances rarely see their fathers. One American study, for example, found that a majority of children of divorce have had no contact, whatsoever, with their father in the past year. Only one child in six (16 percent) had seen his or her father once a week. Another 17 percent saw their fathers at least once a month while 15 percent saw him at least once a year. The remaining 52 percent had had no contact in the past year and of

---

24 Ann Goetting, "Divorce Outcome Research: Issues and Perspectives", Journal of Family Issues, Vol. 2 No. 3, September 1981. Reprinted in Arlene S. Skolnick and Jerome H. Skolnick (eds.), Family in Transition, Toronto: Little Brown and Company, 1983.

25 Paper presented by Joan Kelly at the first Family Mediation Canada Conference, Toronto, November, 1986.

these 36 percent (of the total sample) had no contact in the last five years.[26]

As with other research in this area, the results of father absence research are inconclusive. While some studies have found negative effects for children where the father is absent many have not and some have even reported positive effects for children of having their father absent from the family. What is apparent is that father absence is related to poverty and, in turn, poverty is related to a variety of behavioral and psychological problems.

Besides the factor of poverty, we should, perhaps, not be too surprised that father absence, in and of itself, has not turned out to be all that significant. Underlying this research is the assumption that in all intact families, fathers are actively involved in parenting and play a significant role in children's lives. In at least some families this may not be the case. Christopher Lasch, for example, contends, that, the modern family though patriarchal is, to all intents and purposes father absent. He suggests that the father is, in effect, a "tired night visitor", an observation supported by one study which found that the average father spends only 12 minutes per day interacting with his children.[27] The amount of time spent with children may not be the most important factor and while not actively engaged in parenting, the father may still be extremely important to children. But these kinds of observations do suggest we should not exaggerate the quality of life children experience in intact families or assume that the dissolution of some kinds of families is necessarily a bad thing for children. Indeed, as some research suggests, fathers if they maintain contact with their children at all, become of necessity, more involved in parenting after separation than before.[28]

Children's Experience of Marital Breakdown

The inconclusive nature of research on divorce outcomes and father absence should not be taken to mean that the breakup of the parents' marriage does not have emotional impact on children. Indeed, as more and more studies have been done which rely on the

---

26 Frank Furstenburg et al., "The Life Course of Children of Divorce", A.S.R., 48 (5), 1983, 656-667.

27 Christopher Lasch, Culture of Narcissism, New York: Harper and Row, 1982; Joseph Pleck, Men's New Roles in the Family: Housework and Child Care, Ann Arbor: Institute for Social Research, 1976.

28 Deborah Anna Luepnitz, Child Custody: A Study of Families After Divorce, Toronto: D.C. Heath and Company, 1982

accounts of children themselves, we are learning that parents may often seriously underestimate or be unaware of how extremely difficult a time it is for children and what feelings of anger, bitterness, confusion and guilt are engendered. Much of this, particularly guilt, may be inexplicable to adults. For example, a psychologist recently recounted how a five year old boy she counselled is convinced that had he not had a fight with his parents about eating his spaghetti, his parents would not have separated. He blames himself for the fact that his father no longer lives with him.[29]

Research that has drawn directly on the experiences of children close to the time of the marriage breakup provide us with a rather consistent picture. A British study, by Ann Mitchell, for example, highlights the degree of confusion, surprise and disbelief most children feel when their parents split up. While many had been aware of arguments and sometimes violence, most had felt their family life to be basically happy. Nor did they see the conflict as a sufficient reason for their parents to end the marriage.[30]

Echoing this is Wallerstein and Kelly's account of the latency children in their sample (age six to twelve):

> Despite detailed and often very personal knowledge of the serious causes underlying the divorce decision including repeated scenes of violence between the parents, most of these children were unable to see (initially) any justification for the parental decision to divorce.[31]

As the authors describe, despite having watched their father torture their mother by holding her down on the floor and sticking bobby pins in her nose, the children in the family described, initially opposed the mother's decision to divorce.

Similar findings emerge from a rather unique and recent British study. The researchers advertised for volunteers who had been under 18 when their parents had separated. Those who responded ranged in present age from age six to age 57. Their mainly retrospective accounts again show that many of the children had experienced their parents' separation with disbelief

---

29 A personal communication to the author.

30 Ann Mitchell, Children in the Middle, London: Tavistock Publications, 1985, p. 177.

31 J. Wallerstein and J. Kelly, "The Effects of Parental Divorce: Experiences of the Child in Later Latency", in A. Skolnick and J. Skolnick (eds.), Family in Transition, New York: Little Brown and Company, 1983, p. 443.

and hoped for a reconciliation. Few felt that the level of marital disagreement warranted an end to the marriage.[32]

Most studies of children in divorce have been able to take only one measure and have had to rely mainly on parents' and children's memories of feelings at the time of the separation. That is, there have been few longitudinal studies designed to follow children from the point of separation to several years after. The most famous exception is the widely cited and, perhaps, overly influential study by Judith Wallerstein and Joan Kelly, Surviving the Breakup. The authors studied sixty California families(with 131 children) from the point of separation through a five-year follow up. In addition, one of the authors (Wallerstein) is carrying out a ten-year follow - up study of these same families.

Surviving the Breakup is a rich and complex study,not easy to summarize in a few paragraphs. However, in general, it shows that for all of the children the breakup of their parents' marriage was a highly stressful and disruptive experience and that the effects of the divorce persist long after the actual separation. At the time of the separation, the breakup of the family evoked in these children "shock, intense fears and grieving". While all lived in Marin County, California, notorious for its high rate of marital instability, the ordinariness of marriage breakdown was irrelevant to their level of distress and fear about what the future would hold. Nor did it seem to matter what level of conflict had preceded the parents' decision to separate.

The findings from this study present a rather bleak picture of the effects of divorce on children. However, we should be cautious about generalizing their findings as being necessarily true of all children of divorce. As noted earlier, the respondents in this study were ones who had been seen as in need of counselling and came from families perhaps more distressed than the normal population of divorcing families. Also, the children were interviewed on a fairly intensive basis as well as being counselled. It may be that any group of children, when subjected to this close scrutiny by trained counsellors, would eventually be seen as manifesting many of these same symptoms. As the authors acknowledge, by the five-year follow up many other factors besides the divorce of their parents have also been at work. Finally, the children of the study were not compared with a group of children from intact families.

---

32 S. Walczak and S. Burns, Divorce: The Child's Point of View, London: Harper and Row, 1984.

It is well to note, too, that even among these unhappy children, the authors report that with the passage of time, while anger and hostility still lingered, the "turbulent responses" at the time of the separation had, for the most part abated. And, in interpreting their findings there is the question of whether "the glass is half full or half empty" : while over one-third of the children still showed signs of depression and anger, two thirds did not. Nor could the authors find evidence of other effects which have been associated with divorce. For example, school performance did not seem to be affected by the experience of marital breakup.

Despite these qualifications, Surviving the Breakup is an important study. Its main contribution is not in showing that children are upset and distressed when their parents separate -- we would expect that -- but in its ability to identify what helps and hinders children to adjust to their new situation. Two key factors emerge from their research: 1) easy access and an ongoing relationship with the non-custodial parent and 2) a post-divorce mother-father relationship in which conflict is kept to a minimum. As we might expect these two findings have been widely cited by those making the case for joint custody and shared parenting and the need for separation and divorce counselling and mediation.

Similar conclusions emerge from the other widely cited American study by Mavis Hetherington and her colleagues at the University of Virginia. These researchers carried out a two-year longitudinal study of 96 pre-school children, half of whom were from divorced families. Their focus was on the effect of disruption and disorganization in the parents' lives and its impact on children's behaviour, development and relationship with their parents. At one year after divorce, they found that:

> Children in divorced families were more dependent, disobedient, aggressive, whining, demanding and unaffectionate than children in intact families.[33]

As in the Wallerstein and Kelly study, support and encouragement between the divorced parents contributed to an earlier adjustment of the children. This study also points to the fact that younger children do better when the custodial parent is able to re-establish or establish an orderly and supportive household routine. Yet, as the authors conclude, there is no way to avoid entirely the problems associated with divorce and separation: invariably there is disruption and

---

33 E. Mavis Hetherington, Martha Cox and Roger Cox, "Effects of Divorce on Parents and Children", in Michael Lamb (ed.), Non-traditional Families: Parenting and Child Development, Hillsdale, New Jersey: Lawrence Erlbaum, 1982.

disorganization. While most people do begin to cope with many of their problems, the course of adjustment is more painful and difficult than expected. The authors suggest that this points to the need for more support systems and post-divorce counselling if we want the worst effects of divorce to be mitigated or eliminated.

In sum, the consensus of much of this research is that most divorcing and separating people, not simply those battling over custody and access, are, at the time of the marriage breakdown and for a considerable period afterwards, in need of support and assistance. They seem to require help in their own adjustment but, perhaps more crucially, divorcing and separating people need help in assisting their children to adjust to the momentous changes associated with marriage breakup. Moreover, the consensus of this research is that children fare better when there is a minimum of conflict and they do not lose contact with one of their parents. Thus, this research buttresses the case for both divorce mediation, with its promise of more amicable settlements and for joint custody arrangements which encourage shared parenting. Indeed, among proponents of divorce mediation, these have taken on the status of conventional wisdom.

At the same time, one of the consequences of the impressive growth in feminist-based research has been a questioning of the rather optimistic prognosis that with an end to the adversarial approach and better parenting arrangements, most of the deleterious consequences of divorce and separation can be avoided. As feminists have looked more closely at divorce mediation, no-fault divorce, joint custody and gender-neutral legislation and the accompanying end to sex-based assumptions about parenting and economic support, the earlier and, at times, polly-annish depiction of divorce has been replaced with a more bleak picture of its relative advantages for men but drastic consequences for women and their children. While nascent at the time this project was conceived, questions about the efficacy and latent consequences of mediation particularly with respect to the economic consequences of divorce, and what, in practice, joint custody means for most women have come to be larger and more fully researched and developed issues. In the next two sections we summarize what we view as the more current issues surrounding family law reform and, in turn, divorce mediation. These, in essence, form what we have called the social impact evaluation questions of this research.

CURRENT ISSUES

Economic Consequences

Much of the focus of mediation and separation counselling has centred on the socio-emotional issues. But, underlying many of the tensions and problems of divorce are the economic

consequences which follow from divorce. While, in Canada, with the exception of Montreal, most mediators have been discouraged from dealing with financial and property issues, it is evident that the quality of post-divorce relationships will be shaped by economic issues and, indeed, maintenance much more so than custody or access is often the contentious issue. In the following paragraphs, we consider some aspects of the economic consequences of divorce and separation.

Research on the social and emotional impact of divorce and separation on children has yielded rather contradictory and inconclusive findings. This is not true when we consider the economic consequences of marriage breakdown. Of course, given that there are now two households sharing the same family income, it seems inevitable that, under the best of circumstances, there will be a lowering of standard of living for everyone. But, the best of circumstances seldom seem to occur and the situation is much more unequal than one might initially imagine. In what is, perhaps, the most intensive and ambitious study, to date, Lenore Weitzman finds that, in the United States, when income is compared to <u>needs</u>, divorced men experience on average a 42 percent <u>increase</u> in their standard of living in the first year after divorce while divorced women(and their children) experience a 73 percent <u>decline</u>. As she points out:

> These apparently simple statistics have far-reaching social and economic consequences. For most women and children, divorce means precipitous downward mobility-both economically and socially. The reduction in income brings residential moves and inferior housing, drastically diminished or nonexistent funds for recreation and leisure, and intense pressures due to inadequate time and money. Financial hardships in turn cause social dislocation and a loss of familiar networks for emotional support and social services, and intensify the psychological stress for women and children alike. On a societal level, divorce increases female and child poverty and creates an ever widening gap between the economic well-being of divorced men, on the one hand and their children and former wives on the other.[34]

To our knowledge, there is no similarly compelling set of statistics available for Canada. However, it is apparent that the kind of impoverishment described by Weitzman is also generally the lot of Canadian women with children who are divorced or separated from their husbands. For example, as the Task Force on child care notes, in 1983, some 49 percent of all female single parents had incomes below the poverty line together

---

34 Weitzman, page 274

with 21 percent of male single parents. The net result was that the number of children living in poverty rose by 26 percent in just three years.[35]

It is likely that at least some families were already impoverished or near the borderline of living in poverty prior to the separation or divorce. In many cases and in certain regions of Canada, this is probably the case: fathers simply do not earn enough to support adequately one household let alone two. However, this is not, in general, borne out by the research on maintenance or child support. Studies in both the United States and Canada reach the similar conclusion that 80 percent of divorced fathers could afford to pay child support and still live comfortably.

This becomes even more apparent when we consider maintenance as a percentage of husband's income. Weitzman finds, in California, that for husbands earning under $10,000, 37 percent of their net income goes to alimony and child support payments. In contrast, for men earning over $50,000, the percentage falls to 19 percent. Except for the lowest income group, men are rarely ordered to pay more than one-third of their net income. Thus, mothers and children used to a high standard of living may be forced to experience, if not absolute poverty, relative poverty.

Thus, the amount of support men are usually required to pay does not drastically lower their standard of living. This becomes even more true over time. Rarely do maintenance orders include an "escalation clause" to offset inflation. So, as men's salaries or wages rise due to promotions and cost of living adjustments, maintenance represents an ever-diminishing proportion of their net income. We might add that a further injustice is that, in Canada, maintenance payments are usually tax deductible with the result that men in higher tax brackets will have out of pocket costs of from 60 to 70 percent of the actual amount awarded. Women, on the other hand, must treat maintenance as income and will likely have to deduct income tax from the amount awarded.

In any event, the size of the average award becomes rather irrelevant since in a large proportion of cases, fathers default on their maintenance payments. For example, Weitzman reports that, in the United States, no study has found a state or county in which even half of the fathers comply with court orders. The situation seems to be no better in Canada. An Alberta study showed that fully 80 percent of men have defaulted on their

---

35 Status of Women Canada, Report of the Task Force on Child Care, Ottawa: Supply and Services, 1986, pp. 12-14.

orders after five years.[36] Most of the evidence suggests a gradual process of disengagement whereby, over time, progressively more men fail to make payments or do so irregularly.

Failure to comply with a support order is an offense, punishable, ultimately by imprisonment. In fact, few men are ever incarcerated for non-compliance and are, when summonsed to court, often forgiven their arrears or are allowed to pay them back over a very extended period of time.[37] And, it is worth noting that there appears to be little relation between fathers level of income and compliance. Nor, as the Alberta study found, is there a relationship between visitation and compliance. Men who see their children on a regular basis are about as likely to be in default as those who have little or no contact with them.

In sum, while most family law is now gender neutral and premised on assumptions of sexual equality, such changes are, as Weitzman puts it, premised on an "illusion of equality", an assumption that men and women are equal at the time of divorce. The reality, of course, is that there remain structured sexual inequalities in the labour force and between men and women within the nuclear family. One of the unintended consequences of such reform is, then, to destine many women and children of divorce and separation to absolute and relative poverty.

Clearly, divorce mediation cannot change the basic patterns of class and sexual inequality in North American societies. Nor can it redress the fact that marital dissolution will, even with equitable maintenance awards, mean a lower standard of living for all family members. But, underlying the logic of this approach is that in the process of bringing about an amicable settlement and helping people to recognize their continuing role as a parent with emotional and economic responsibilities to their children, it at least holds the promise of better awards and better compliance with those awards.

---

36 Canadian Institute of Law Research and Law Reform, Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved, Edmonton: The Institute of Law Research and Reform, 1981.

37 See, for example, Andy Wachtel, What Works: An Exploratory Examination of Court Enforcement Efforts and Payment Levels of Maintenance Orders Monitored by the Vancouver Family Court, B.C. Planning and Research Department, 1983; and Andy Wachtel and Brian E. Burtch, Excuses: An Analysis of Court Interaction in Show Cause Enforcement of Maintenance Orders, Vancouver, Social Planning and Research, 1981.

However, feminists have questioned whether women (and their children) might not fare better, economically, if represented by a strong lawyer. That is, because of their lack of experience with negotiation and with financial matters, generally, do women enter mediation with unequal bargaining power and end up settling for less than had they used the traditional adversarial process? While this seems a reasonable concern, there was, at the time this research began, no empirical evidence which would allow us to substantiate or reject this alleged unintended consequence of divorce mediation. As noted above, the other concern centers on changing patterns of custody awards and the implications of this for women.

Custody and Parenting

While there seems now to be fairly well-established rules about property division, things are much less clear when it comes to "dividing up the children" and how, once that decision is made, they should be supported. This is not the place to set out a history of changing presumptions and legislation about custody.[38] But, it is apparent that, over the past 100 years, the rules for determining custody have been in a state of flux. In the mid to late nineteenth century we moved away from the traditional right of the father to his children (or at least to the older, and therefore economically productive children) to what turned out, in retrospect, to be the relatively short-lived presumption of maternal preference as embodied in the "Tender Years Doctrine". This was replaced by the supposedly more gender- neutral rule of the "Best Interests of the Child Principle", though it is evident that, in practice, "maternal preference" was subsumed under this principle: what was in the best interests of the child is that he or she be given over to the mother.

Confusing things further, was the notion of the "psychological parent", who could be of either sex or, for that matter, not even the biological parent. As advanced by Goldstein and his colleagues, custody decisions should be made in recognition of the child's psychological need for "unbroken continuity" and for quick settlements that recognize that children's sense of time is quite different than adults.[39] If custody is in dispute, it is better to "flip a coin" than put the children through a protracted and lengthy custody dispute and a period of uncertainty. As Bala and Clarke put it, out of the "continuity principle the

---

38 For a useful description, see Nicholas Bala and Kenneth Clarke, The Child and the Law, Toronto: McGraw-Hill Ryerson, 1981, Ch. 3.

39 J. Goldstein, A. Freud and A. Solnit, Beyond the Best Interests of the Child, New York: Free Press, 1973.

legal definition of the model parent has arisen, like a phoenix arising from the ashes of the common law".[40] The model parent is, of course, the psychological parent, usually the parent who can offer the most promise of continuity. While this will usually be the mother, the authors of this influential book make clear that, in their view, either parent is equally capable of parenting. Indeed, their work seems to have been the catalyst behind the notion that both sexes can nurture children successfully.

Also based in social science research, notably the finding that children adjust better when they have ongoing contact with both parents, has been the recent emphasis on joint custody or shared parenting. While the Divorce Act, 1985 retains notions of custody and access, in this latest transition, these concepts, with their connotations of children as property, seem to be gradually giving way to concepts such as "primary parent" and "secondary caretakers" and so on.[41]

Patterns of Custody

While things may be changing, it seems evident that judges traditionally have preferred the mother and, in doing so have reflected what most people believe. Leupnitz, for example, in her study of divorced families found that where mothers had full custody, the usual response to how this came about was that "it was never in question; it was just assumed that I would have the children."[42] However bitter the dispute between the parents, apparently, most men recognize how central children are to the lives of women, particularly those who have stayed at home. Traditionally, men's occupational role has been as important, if not more important, than their parental role. Separation and divorce do not change this. For women to lose custody of their children will often mean a drastic change in their lives. And, whereas there is little stigma attached to fathers who do not fight for custody of their children, women who relinquish custody or who prefer joint custody feel, or are made to feel, that they must not love their children. And, of course, where women do agree to give up custody or "lose" in court, they are likely to be seen as incompetent mothers or as in other ways at fault.

---

40 Bala and Clarke, p.53.

41 Personal communication with Mr. David Day. But, see also his critique of the terminology of the Divorce Act, 1985 in Alastair Bissett-Johnson and David Day, The New Divorce Law: A Commentary on the Divorce Act, 1985, Toronto: Carswell, 1986, p. 39.

42 Deborah Ann Luepnitz, Child Custody, Toronto: D.C. Heath, 1982.

It is hardly surprising, then, that, despite the gender-neutral language of most legislation, about 86 per cent of Canadian and about 90 per cent of American custody awards are made in favour of the Mother.[43] The small minority of men who have sought custody of their small children will usually have had to overcome the deeply rooted values, beliefs, truths and stereotypes underlying the presumption of maternal preference. Something of the power of these assumptions and idealizations of the "Mother" role, can be seen in the fact that most men do not contest custody either because they too believe children should be with their mother or because their lawyer advises that it will be an expensive and probably futile effort to do so.

Joint Custody

Whether or not to move towards a presumption of joint custody was a hotly debated issue at the time the Divorce Act, 1985 was before the standing committee and remains so today. The committee, in other words, was pulled in two quite different directions by equally committed interest groups. On the one hand, are Father's Rights groups which have argued that the presumption of maternal preference, in either its explicit or more implicit forms, perpetuates sexual stereotypes as limiting and archaic as those which have barred women from equal access to the work place and which ignore the fact that some men are deeply committed to parenting. According the this view, men are not only denied their children but, at the same time, are made to pay "exorbitantly" for having become divorced. Obviously, there are some merits in this argument and, certainly, it is probable that many men do not contest custody because they believe, or are advised by their lawyers, that in the face of prevailing attitudes, to do so would be costly and they would "lose" anyway. These groups have, then, advocated that there be gender equality in practice as well as simply language and, in turn, for a presumption of joint custody.

At the same time, various women's groups have not generally been opposed to joint custody in principle and, indeed, to be consistent with other positions, must share some of the views of Father's rights groups about neither sex inherently possessing

---

43 Statistics Canada's analysis of Central Divorce Registry data indicates that when women are petitioners, they almost always receive custody (95.7%). When men are petitioners, they receive custody in 42.6% of cases. Since most petitioners are women, overall in 85.6% of the cases, women are awarded custody. See, Divorce: Law and the Family in Canada pp. 207 and 211. American figures come from Lenore Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women in America, New York: The Free Press, 1985, Ch. 4.

parenting qualities. They have, however, been concerned with the unintended consequences of a presumption of joint custody. First, there is concern that where violence and alcoholism and, perhaps, sexual abuse, precipitated the breakup of the marriage, women should have the right to deny men custody and, perhaps, access to the children. Second, they point out that where joint custody has been awarded, it often turns out to be joint legal custody but physical custody to the mother. Yet, goes the argument, men, in obtaining joint custody, are, apparently, able to pay less in child support than where custody is awarded to the mother. Thus, not only does the wife bear most of the responsibility for child rearing but she may do so with less resources. Moreover, there are fears that where a woman is, for various reasons, reluctant to enter into a joint custody arrangement, she may be seen by the courts as uncooperative and thereby be at risk of losing custody altogether.

Proponents of joint custody, have of course, made considerable use of the findings that a crucial factor in children's adjustment to their parents' divorce is the continuing involvement of both parents in parenting. But, as they also point out, there may also be other benefits to children in that they receive better quality parenting when parenting responsibilities are shared. One of the major stresses for post-divorce mothers with sole custody is that they often feel overwhelmed, overburdened and imprisoned at the very time when they are attempting to become economically independent. Recent legislation puts an onus on women to become economically independent whenever possible. But this also puts them into a double bind. On the one hand they are expected to look after the children like good mothers but they are also supposed to become, after some specified time, economically self sufficient, capable of contributing as much as their former husbands to the maintenance of the children. Thus, as various studies show, one of the main advantages of joint custody <u>when</u> it involves joint parenting is that it allows both parents more time to pursue their own projects. Research which has focussed explicitly on joint custody has generally produced positive findings. But, as many of these researchers admit, their subjects have been mainly middle class couples possessing the resources necessary to make the arrangement work. In other words, joint custody may not be a realistic alternative for everyone.[44]

---

44 A good review of this literature can be found in H. Jay Folberg and Marva Graham, "Joint Custody of Children Following Divorce", in Howard Irving (ed.), <u>Family Law: An Interdisciplinary Perspective</u>, Toronto: Carswell, 1981. Some recent Canadian data are reported in Howard Irving et al., "Shared Parenting: An Empirical Analysis Utilizing a Large Data Base", <u>Family Process</u> (23), 1984. An excellent summary of the feminist critique of joint custody can be

Lenore Weitzman has studied the California divorce legislation which makes it mandatory for judges to give first preference to joint custody when one or both parents request it or when in the judge's view it would be in the interest of the children to make such an award. She finds that, in practice, the legislation has not had a major impact on the pattern of custody awards in California. While about 18 percent of awards are now joint custody awards, it appears that many of these are, in fact, joint legal custody awards with physical custody to the mother. Weitzman concludes that most men and most women do not want to share post-divorce parenting. Such arrangements require inordinate amounts of time, energy and money, things that most couples cannot afford. She also found that while a minority of men want more involvement in the parenting of their children, the reality is that most men do not want custody of their children or more involvement with their children. For example, her interview data show that 70 per cent of men without custody would prefer to see their children less often while 30 per cent said about the same. None said that they would like to see their children more often.

Nor does joint custody necessarily lessen the conflict between ex-spouses. Jessica Pearson, who has carried out a large study of divorce mediation in Colorado, found that fully half of the joint custody awards had been changed because they were found to be unworkable.[45] These were awards worked out, often through the help of a mediator, and were not imposed by the Court. Similarly, Luepnitz found in her small American sample, no difference in levels of conflict and hostility between couples with joint as opposed to sole custody.

What of the small number of cases where men do ask for custody? Despite the contention of Father's Rights groups that the Courts are biased in favour of women, it appears that when men in the United States do contest custody, they have a more than equal chance of "winning". Lenore Weitzman, for example, finds for her California sample that some 63% of men who reques-

---

found in Lenore Weitzman, Ch. 8.

45 Jessica Pearson and Nancy Thoennes, "Child Custody, Child Support Arrangements and Child Support Payment Patterns", Paper presented at the Child Support Enforcement Research Workshop, August, 1984, Washington, D.C. See also the various papers by the same author in The Denver Custody Mediation Project: Final Report, no date.

ted custody were successful.[46] In Canada, according to the Statistics Canada report on divorce,the "success rate" has been about 43 percent.[47] We must, of course, consider the reasons and circumstances which might lead men to break with the tradition of maternal preference. There is some research which suggests that the former may be driven to seek custody because the mother, for various reasons, is incapable of parenting or does not want the children.

At the same time, there is some evidence that men who have departed from traditional fathering and participated even to a limited extent in child care may be favoured by the Courts. This is the conclusion reached by Susan Boyd, a Carleton University law professor. She has examined Canadian custody decisions involving employed mothers in the 1980's and concludes that they reveal "an absence of discussion of primary responsibility for parenting, an attendant inclination to overemphasize fatherly involvement in child care and, overall, a tendency to penalize working mothers for the perceived instability of their lifestyles." As Boyd notes, men who work full-time but show some interest in and involvement with parenting are viewed by the Courts as dedicated fathers. Women who have departed from traditional mothering models and who work full-time and do most, but not all, of the child care are considered "half" mothers and as uninterested in parenting. She also observes a recent tendency to award custody to the parent who can provide the most financial stability and highest standard of living. Given average differences between men's and women's earning power, it is evident that this would also tip the scales in favour of the father.[48]

In the United States this has raised questions of whether gender-neutral legislation may not have the unintended consequence for women, who want their children, of terrorizing them into accepting inadequate and unfair financial settlements in order to avoid going through a costly custody battle and taking a

---

46 L. Weitzman, pp. 231-235. See also, Nancy Polikoff, Why Mothers are Losing: A Brief Analysis of Criteria Used in Custody Determinations, cited in Martha L. Fineman and Anne Opie, "The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce", Unpublished paper.

47 Statistics Canada, Divorce: Law and the Family in Canada, p. 147.

48 Susan B. Boyd, "Child Custody and Working Mothers", in Sheila L. Martin and Kathleen E. Mahoney (eds.), Equality and Judicial Neutrality, Toronto: Carswell, 1987, pp. 168-183.

risk of losing their children. As Nancy Polikoff, an American lawyer, has recently observed, "Women who are scared to death of losing their children will trade away anything else--child support, property, alimony--to keep it from happening."[49] Whether, in the United States or Canada this is a real or a potential problem, remains to be seen. This contention does, however, point to some of the difficulties and pitfalls in attempting to implement legislation intended to be fairer and less sexist than what existed in the past.

In short, legislators are caught in something of a dilemma. Probably, father's rights groups are correct to argue that maternal preference, in whatever form, perpetuates antiquated stereotypes and attitudes about gender appropriate roles in modern society. These are views which no one, but particularly feminists, wish to see continued in the future. Certainly, those men who are committed to and have been involved in parenting their children should not suffer because the majority of men are not good primary caretakers or are uninterested in having an equal share in child rearing. Nor can we assume that all women are inherently the better parent or, for that matter, want full-time custody of their children.

This issue is, in part, a subject for the future evaluation of the divorce act. But, it is also apparent that this debate about the merits and demerits of joint custody is also of relevance to an evaluation of divorce and family mediation. Our impression, from conferences and interviews is that mediators have been strongly influenced by the positive findings on research on joint custody and are firmly committed to the importance of children having maximum contact with both parents whatever the actual legal decision about custody. Feminists have expressed concern that women may feel forced into joint custody even though there is a history of violence, physical and psychological abuse and addiction on the part of their ex-spouse. Again, at the proposal stage, we lacked the evidence to comment one way or another on this issue but felt compelled to consider changing patterns of custody as one of the possible social impact questions to be addressed in this research.

Before concluding this section, it is worth noting that for Weitzman, as for other feminists, there is a rather poignant irony in the apparent consequences of family law reform and non-adversarial approaches to resolution of familial and marital disputes. At the manifest level, the new legal norms of gender quality and gender neutrality promised an end to patriarchy within the legal system and a shedding of anachronistic assumptions about women's roles and women's capacities that permeated traditional family law. But, the attempt to treat men

---

49 Quoted in The New York Times Sunday, April 6, 1985.

and women as if they are equal at the point of divorce ignores the structural inequality between men and women in the larger society. Weitzman, then, on the basis of her research concludes that, in the context of these larger inequalities, women undergoing divorce need some of the protection afforded them under traditional law:

> It did not take long to see that many sex-based assumptions that were ridiculed a decade ago--assumptions about women's economic independence, their greater investment in children, their need for financial support from their ex-husbands-were ironically not so ridiculous after all. Rather, they reflected, even as they reinforced, the unfortunate reality of married women's lives, and they softened the economic devastations of divorce for women and children (p 359).

At the same time, the conclusion of Weitzman's study is not that there should be a return to more restrictive divorce laws, to faults and penalties, but to ensure that within existing legislation, there are economic safeguards and provisions to assure adequate protection for women and children.

SUMMARY OF EVALUATION ISSUES

Some years ago, Marshall McLuhan observed that most of the time we have a kind of rear-view mirror image of the society in which we live; we write and comment and, presumably, do research on a present which is already our past. Nowhere does this observation seem more apt than in the area of family law reform. As we have just seen, various aspects of family law have been under attack since at least the mid 1970's. In retrospect, much of this critique was, at least implicitly, informed by the then devastating critiques of the conventional family and perhaps, more generally, the individualism inherited from the world-view of the 1960's counter-culture. But, it was not until the end of the 1970's that unified family courts were tried out in Canada. And, of course, it was a full decade after the Law Reform Commission reports that new divorce legislation was finally proclaimed. It would, indeed, be surprising, if in the intervening years, the climate of opinion had not changed both with respect to the family but also with respect to family law and its administration.

While we have hardly come full-circle in the 1980's, it is apparent that the devastating critiques by feminists and psychiatrists of the family which occupied so much attention in the 1970's have, to a considerable extent been supplanted by the "Norman Rockwell" imagery of what Eichler refers to as the

"patriarchal family movement"[50] and the more sober re-examinations and re-appraisals of marriage and family by sociologists who have come to see much in the nuclear family to be valued and extolled.[51] And, where feminists of the 1970's were primarily concerned with the oppression and inequality inherent in these institutions, they have, in recent years, demonstrated that these consequences may continue into the post-divorce family. In the process, they have raised new questions about the role of the state in marriage breakdown and forced us to re-think what are the issues in a study and evaluation of divorce mediation.

This project had its genesis in the experience of the evaluations of the unified family courts. Concerns of the Law Reform Commission about the state of Canadian family law in the 1970's were highly influential in the formation of the research questions which formed the basis of those evaluations. However, the experience of the research on the unified family court demonstration projects had also made us somewhat skeptical about the claims of those promoting divorce mediation. For example, at the end of the summary report on unified family courts, it was noted that while all of the evaluators had been able to say a good deal about how a social arm fitted into and interacted with the legal and administrative arms of the courts, none had produced much knowledge of its impact on the overall court process and, for that matter, whether conciliation counselling, as it was then generally called, was, in fact, a better route to go than using a purely adversarial approach.

And as one looked over the collective data and read through the then existing literature, what was particularly striking was that while the mediation/conciliation literature seemed extremely optimistic about the cost benefits, about the role these approaches played in reducing hostility and in improving post-divorce relationships, most of the Canadian research had focussed on the service itself and had, for a variety of reasons, not put mediation and conciliation counselling into the context of the overall court process. It had more or less ignored the fact that the vast majority of settlements, whether under provincial or

---

50 Margrit Eichler, Families in Canada Today, Toronto: Gage, 1988.

51 The best of these neo-conservative views on the family are contained in Peter Berger and Brigitte Berger, The War Over the Family, New York: Basic Books, 1984.

federal legislation are made with no recourse to mediation or conciliation counselling.[52]

In addition, it was evident that much of the then existing research on mediation had been largely descriptive and non-comparative and had, at times, used samples which stacked the deck in favour of divorce mediation; those included in studies were often a highly self-selected group or had been referred to mediation.[53] It was also apparent that while there is wide-spread agreement that there is a need for a service in the courts, the data showed that it is extraordinarily difficult to get people involved in the mediation process. While women seeking a maintenance order have some motivation to approach the court (or are forced to by Social Services) and thereby find themselves involved with the social arm, it is never easy to get men to come and work out a responsible agreement. As one of the presenters at a recent conference on mediation noted, in the USA, the supply of people able to train mediators and the number of mediators far outstrips the present demand, a conclusion which Jessica Pearson also reached after her important Colorado study of divorce mediation.[54] This resonated well with what was known about the unified family courts: most of the lawyers who researchers encountered in the various evaluations seemed very reluctant to refer people to mediation. Often there was outright antagonism and opposition.

Court-based conciliation and mediation services have, in Canada, been mainly funded as experimental or demonstration projects. Some have subsequently disappeared while others must fight annually for their survival. This was also the case for

---

52 In the unified family court projects, as in various provincial court services, those most likely to have access to court-based counselling and mediation are those seeking support and custody under provincial legislation. Divorce cases are not, of course, heard in provincial courts and in the unified family courts it appeared that these usually by-passed the social arm of the court. See, for example, C.J. Richardson and C. Rogers, An Evaluation of the Fredericton Unified Family Court, New Brunswick: Department of Justice, 1983; and A.S. Ross and M.J. Grant, An Evaluation of the St. John's Unified Family Court, Newfoundland, Department of Justice, 1982.

53 For a very thorough summary of limitations of divorce mediation research, see Kenneth Kressel, The Process of Divorce, Ch. 9.

53 J. Pearson and N. Thoennes, "Mediating and Litigating Custody Disputes: A Longitudinal Evaluation", Family Law Quarterly, 1982, 17, 497-524.

the Unified Family Court Projects. While all of the projects have gone on long after their demonstration period and the end of federal funding, in none of them did it seem that the social arm had become fully institutionalized; while no one suggests getting rid of the judge or, the court administrator and so on, the social arms in all of the courts were, at the end of the projects, under constant threat of annihilation. There was, then, the continuing need to justify themselves and to do so largely in cost benefit terms.

It seemed, then, that there was a need to know systematically and over a longer time period, the relative benefits of mediation compared to traditional approaches. And, second, assuming that mediation is, in fact, a better approach, there was a need to know more about its overall impact on the workloads of family courts. Third, was the need for more systematic knowledge about the kinds of clients who do and do not use these services and who can benefit most from them. Finally, it seemed important to know more about lawyers' and judges' perceptions of and attitudes to conciliation and the factors which enter into their decisions whether to refer clients to divorce mediation.

Most of these questions are still with us and this research project attempts to address most of them. Inevitably, however, over the course of this lengthy project, the focus of inquiry has shifted much more to a concern with the kinds of unintended consequences of marriage breakdown just discussed under the heading of "Current Issues " and the role of family law reform and divorce mediation in mitigating or exasperating these alleged negative outcomes.

As well, to return to Marshall McLuhan's warning, it is apparent that the earlier critiques of family law, discussed at the beginning of this Part, suggest a kind of "clash of cosmologies" between lawyers and mediators -- bad guys and good guys. But, while a possibly accurate depiction of past attitudes and practices, it no longer seems an apt depiction of the current state of family law. For example, while actual legislative change may have been slow to come, changes in attitudes, procedures and philosophy have seemingly presaged the more formal change. At the provincial level and now at the federal level, family law is cast in gender-neutral terms. Alternatives to the traditional adversarial approach, such as mediation, seen as novel and controversial a decade ago, have, we believe, become, to a large extent, taken for granted and are on the way to becoming

institutionalized.[55] Too, while there are undoubtedly some extremely litigious lawyers practicing family law, we have every reason to believe that most cases are handled by family law practitioners who, though willing to litigate when necessary, believe that in the areas of maintenance, custody and access everyone is better off with a negotiated or mediated settlement than one imposed by the court. Most, then, encourage their clients to negotiate a settlement and, as well, some are practicing mediation or referring clients to mediators in their community. Moreover, there now seem to be few family court judges who believe that, in the matter of custody, the adversarial approach will "reveal the truth" of who is the better parent. They rely much more -- sometimes invariably -- on custody assessments or investigations or they refer the disputing parties to mediation.

In sum, in the process of conducting this research, it became more and more apparent that we were not dealing with two diametrically opposed approaches to dispute resolution and that the line between adversarial and non-adversarial approaches is more difficult to draw than we would, from a purely methodological standpoint, have wished or that might have been the case a decade ago. In short, family law has changed in many ways and the role of divorce mediation in the process of marriage breakdown is more subtle and complicated than was perhaps true in the past. Having said that, we turn in Part III to describe the methodology and research base which addresses the many questions and objectives of this project.

---

55 For example, as has been pointed out to us, in at least Ontario, there are now financial disincentives in the Rules of Civil Procedure to litigating a family dispute matter. If the offer of settlement is close to the sum or arrangement ordered by the court, the party rejecting the offer of settlement is penalized in costs. (Personal communication from W. Bryans, Department of Justice, Canada).

PART III: DATA SOURCES AND METHODOLOGY

OVERVIEW

Research findings reported here were generated from a project which began in July, 1985. It has as its focal point a longitudinal study of a sample of divorce and separation cases divided into those which involved mediation and separation counselling and those which involved only the traditional legal process. The study is longitudinal in the sense that the aim has been to follow cases from intake to final disposition, to interview clients involved in these cases some six months after the final settlement and, finally, to monitor these same cases in order to determine how many of each kind of case return to court for variation of the order or to enforce the existing order. But, as noted in Part 1, the introduction to this report, the project ended up having a number of research objectives which though related to an evaluation of divorce mediation went beyond that particular set of concerns.

There are three basic components to this study: a systematic analysis of court records, what we refer to as the Case Analysis Study; an observational study, what we call the Observation Study and personal interviews with the former spouses whose cases we studied in the Case Analysis Study, what we call the Client Interview Study. In addition, are two supplementary studies, one involving face-to-face interviews with family law practitioners and a mail survey to lawyers interested in or practicing family law, the Lawyer Study and a mail survey of mediators and counsellors, the Mediation Study.

At the outset, this project encompassed three research sites: Saskatoon, Montreal and St. John's (a separate but related project has been carried out in Winnipeg by other researchers). However, when it was decided that this project could also provide baseline data for a future evaluation of the Divorce Act 1985, the Ottawa court was added as an additional research site. Research in this latter site has been limited to the Case Analysis Study and the Client Interview Study and has excluded separation cases under provincial legislation. Moreover, since there was no court-based mediation services in Ottawa, the focus was almost entirely on collecting data relevant to the divorce evaluation.

The same research instruments have been used in all four research sites and, at various points in the project, researchers have met together to ensure that comparable data were being collected in each court and in the observation study and, of course, in the interviews with clients; indeed, to a very large extent, the kinds of information collected in this project were heavily influenced by the researchers' experience of their respective courts and their growing knowledge of the complexities

of the uncoupling process. The result is that, while we have separate data for each of the four sites, we view this study as one research project spread over a number of different family courts and, with some few exceptions, do not report our findings separately by research site. There are three reasons for this decision. The first is that we have a lot of data to report and it becomes excessively unwieldy to show each and every table separately for three and, in some cases, four research sites. Second, this is not an evaluation of any particular service; the sites chosen were already assessed as good examples of court-based mediation and separation counselling so that our aim here is to look at divorce mediation in a general context. And, finally, after considerable examination of the separate data for the three mediation sites, we don't find, for many variables, great differences, particularly in terms of outcomes and settlement rates, client perceptions, and so forth, between the three. Where there are dramatic differences or where the obviously different level of affluence between the four sites is relevant, we do break things down and look separately at each research site.

ORGANIZATION OF THE RESEARCH

For the greater part of this project, the project manager of this project (and the main author of this report) was located in Fredericton, New Brunswick, a place which, unfortunately, was not one of the research sites.[56] Researchers were appointed in each of the research sites and were given a very high level of responsibility for conducting all phases of the project as it pertained to their particular court and jurisdiction. Their contributions have been noted in the acknowledgements to this report, but it is well to note, in a discussion devoted to methodology and research design, that none were, "parachuted" into the research sites; all were chosen because they had, along with the appropriate research expertise, knowledge of their own community and a commitment to the issues which they were asked to study.

Two of the four researchers were with the project from beginning until end. The intent was that this would have been true for all of the researchers in the three mediation sites; budget and the more limited scope of the Ottawa research meant that the researcher there was, from the outset, understood to be on a more limited contract basis. In St. John's, aside from other problems (described in Part 4), the original researcher became ill and was unable to continue with the work. Her replacement felt compelled to leave the project just as the client interviewing stage of the project was about to begin; she was

---

56 From July, 1986 until the end of the research, he was located in Toronto, also not one of the research sites.

offered a more or less permanent position. Given Newfoundland's rate of unemployment and the fact that her contract with us was, of necessity, of limited duration, it would be an exceptionally churlish employer who would not congratulate her on landing a steady job. More by accident than design, her replacement, after completing the interviewing in St. John's, moved to Toronto and, in fact, coded much of the interview data and all of the data for the supplementary studies under the direct supervision of the project manager of this research.

This project was conceived around a series of research activities which would lead one into another and which would offer the researchers in each site a varied kind of workload. The project began with collection of data from the court files and the separate files maintained by mediators and court counsellors. Before we could do this we had to ascertain what was in the files and each of the researchers had to learn how their court operated and how things were filed. This took time; more than we anticipated. And, in each research site, we also spent time trying to introduce special intake forms which we hoped would capture more data than are systematically recorded in court files. By and large, this worked for matters falling under provincial legislation and for cases which went to the social arms of the various courts. It did not work for most divorce cases where we were dependent on lawyers' cooperation. Either lawyers did not cooperate or they did not have the information we requested or, for bureaucratic reasons, this effort never got off the ground.

The end result was that we depended, at this initial stage, primarily on what was available in the court files. As the researchers began to collect data from these files, they were (with the exception of Ottawa) also beginning to undertake the observational study. Though initially called the "court observation study", it should be noted that our focus was almost exclusively on divorce mediation and separation counselling in the court context. In other words, while all researchers spent time in the courtroom, they did not, except in the most general way, observe courtroom procedures and practices so that our original title was something of a misnomer. All did, however, attend some mediation sessions and talked continually with the mediators and counsellors about their work and their cases.

We left the courts in about February, 1986 although all researchers were compelled to return, from time to time, to check whether the status of unresolved cases (of which there were a number in each court) had changed. The spring and summer of 1986 were devoted almost exclusively to client interviewing. All four researchers were involved in interviewing but were assisted by a number of part-time interviewers who were chosen by them and who

worked under their direct supervision. These research teams met regularly to discuss problems in interpretation of questions and to ensure that comparable data were being collected.

As described below, the interview schedule was lengthy and comprehensive with the result that coding, keypunching and "cleaning" of data took most of the autumn. At the same time, researchers in two of the mediation sites -- Saskatoon and Montreal -- conducted relatively unstructured interviews with family law practitioners in their jurisdiction.[57] This was in preparation for the subsequent mail survey to a nation-wide sample of lawyers who have expressed an interest in the area of family law. This survey and the parallel mail survey to mediators in Canada was conducted over the period of December, 1986 until February, 1987. Over this same period, the researchers completed a qualitative analysis of the client interview schedules and completed their reports for the Observation Study. Their final task was to return to the courts to determine how many of the cases included in our initial sample had returned for enforcement or variation of an order. The following sections describe the three basic components of the project and the two supplementary studies.

CASE ANALYSIS STUDY

This research component was designed to collect basic demographic and financial information on both petitioners and respondents and to track both separation and divorce cases through the court process from point of entry to final disposition. The main reasons for including separation cases were that many of the mediation cases are those which eventually will proceed, or are already proceeding, under provincial legislation. And, particularly in Montreal, a number of mediation cases do not immediately, if ever, become court cases; couple, having worked out a separation agreement, may not have it turned into a court order or minutes of settlement in a divorce petition. As well as determining the role of mediation in these processes, we were also concerned with documenting the number and kinds of issues initially in dispute and in relating these to final outcomes in terms of custody, access and maintenance quantum. We also sought evidence of previous court involvement, indicators of case complexity, length of time between filing and disposition and amount of court involvement in various kinds of cases. In all, there are some 170 variables within the coding frame of this study.

---

57 In St. John's, lawyers were interviewed by the project manager.

Clearly, not all of these variables are relevant for all cases since many apply only to particular situations. For example, as a result of the decision to collect baseline data for the divorce evaluation, we included a number of cases where no children were involved. Thus, variables concerned with such matters as custody and access, and usually, maintenance are not applicable to such cases. More generally, much of the data on case complexity and contested matters applies only to a minority of cases. And, as predicted, even where certain kinds of data are relevant to a particular case, there is no guarantee that the information will be recorded in the court files; there are, in other words, missing values for virtually every variable some of which are because the datum does not apply to that situation and sometimes because it is simply not recorded.

There are three major gaps in the data we were able to record from the court files. The first is that present income and occupational status of petitioners are available only for those cases where a financial statement was included with the divorce petition. While special intake forms were introduced in all of the courts, these mainly captured separation rather than divorce cases.[58]

A second gap is that we were able to code data on previous income (mainly of females) in too few cases and with too little reliability for these data to be very usable. In any event, as is discussed in a later section, we are not convinced that there is much to be learned from knowing the pre-and post-divorce income of women; as we learned, women are sometimes better off living on social assistance than they were in a marriage situation where most of the family income was controlled by the husband and was spent on alcohol and drugs.

Finally, the Case Analysis Study was only able to produce income and occupational data on a minority of respondents to the divorce or separation. As will be seen later, in some 60 percent

---

58 The reason is fairly simple: women not able to afford a divorce or who do not have grounds can apply to the court for a maintenance order (and sometimes, custody). Such women usually pass through the intake procedure of the court. Divorce cases, on the other hand, are almost invariably handled by lawyers who simply file the necessary paperwork and work out a court date. Attempts to involve lawyers in the data collection process were unsuccessful for a variety of reasons which also varied from court to court. In Montreal, there are simply too many lawyers to make such an approach feasible. In other sites, there were problems with respect to concerns of lawyers with privileged information and the fact that often they did not have the information we required.

of cases, respondents do not respond to the divorce petition with the result that information in the court files is sporadic and uneven. As a result, this report, makes very little use of these limited data.

Having noted these qualifications, it should, nevertheless, be pointed out that the data we do have on income corresponds very closely to what was reported in the later interviews. The analyses of the economic consequences of divorce which follow later in this report draw upon both the Case Analysis and the Client Interview Study data on incomes and maintenance quanta.

In all as shown in Table 3.1, over the four research sites, data were collected for 1773 cases. The different sizes of the four courts and the different kinds of cases we wished to include necessitated different sampling frames and sampling strategies in each research site. Because of their importance both to this evaluation and to the mediation study, all contested cases in the courts in Saskatoon, Ottawa and St. John's filed from January 1985 to December, 1985 were included.[59] In Montreal, we analyzed all the contested cases that were settled between January, 1985 and September, 1985.

With respect to uncontested cases, researchers in two of the four sites-- Saskatoon and St. John's included all of the uncontested cases completed between September, 1985 and January, 1986. In Ottawa, the researcher drew a random sample of cases designed to produce approximately 200 completed cases. In Montreal, we simply took completed uncontested cases for August and September of 1985. Thus, only in Montreal and Ottawa were we able to draw a random sample of uncontested cases. Finally, in developing their samples of cases, researchers ensured that they included all mediation or separation counselling cases which had or would be completed between January, 1985 and December, 1985. This yielded 363 cases.

---

59 As noted in more detail, below, there are varying definitions as to what is and is not a contested divorce case and many of those which initially were defined as contested were settled prior to the court hearing. Our researchers coded cases as contested using the particular criteria in each court. In general, the policy is to define a case as contested if there is a counter claim or a counter petition in the file.

Table 3.1
Distribution of Cases by Type of Case and Research Site

Type of Case	Research Site				
	Montreal	Saskatoon	St John's	Ottawa	Total
Uncontested Divorce	206	270	214	218	908
Contested Divorce	173	35	76	70	354
Uncontested Separation	65	94	117	--	276
Contested Separation	16	24	21	--	61
Mediation/counselling only	68	42	36	--	146
Common Law	25	--	3	--	27
Totals	553	465	467	288	1773
Mediation Cases	152	141	70	--	363
Non-Mediation Cases	401	324	397	288	1410

CLIENT INTERVIEW STUDY

While the Case Analysis Study provides systematic data for both the mediation study and the divorce evaluation, our richest data source are the interviews conducted with those who had just been through the divorce or separation process. Research on family, marriage and divorce has usually been based on extremely small and unrepresentative samples. Here, we have extensive data on some 905 divorced or separated men and women. Of these, 618 are divorced as opposed to separated individuals. We were somewhat more successful in contacting women than men with the result that 58 percent of our sample is made up of the former. Our intent was to interview both of the previous partners in the marriage. Of course, this was not always possible with the result that 56 percent of our total sample is made up of what we call "matched couples". Separate analyses of this sub - sample indicate a high degree of agreement between responses of men and women with respect to factual matters and, we find, too, that the pattern of responses for the matched couples does not differ remarkably from comparisons of the full sample of men and

women.[60] Thus, most comparisons of men and women used in this report are based on the full sample of divorced individuals rather than the sub-sample of matched couples.

Table 3.2
Distribution of Client Interviews by Type of Case and Research Site

Type of Case	Research Site				
	Montreal	Saskatoon	St. John's	Ottawa	Total
Divorce	137	181	101	199	618
Separation	94	109	73	73	287
Totals:	231	290	174	210	905
Mediation	111	137	65	11	324
Non-mediation	120	153	109	199	581
Females	121	144	116	121	502
Males	110	146	58	89	403

From a sampling point of view, the client interviews are a sub-sample of what, in some instances, was a random sample of court files and, in other instances, comprised the whole population available in that particular court. As noted above, we included all of the mediation cases we could in this study and, in two of the four courts, all of the contested cases. In other words, the general strategy was to over represent those case which, though relatively rare, were seen as of particular importance within the context of the goals of this project. It is difficult, then, to determine how representative is our sample of divorcing and separating couples, generally. However, comparisons of the interview data with the Case Analysis data suggest that those we were able to interview are somewhat better off financially and are of a slightly higher socio-economic standing than the overall sample of divorcing and separating couples. That is, we have, as in most research, under represented the very poor and, probably, in turn what the family literature refers to as the "multi-problem" family. As the various tables in Part 5 concerning income reveal, the differences though real should not be exaggerated.

The interview schedule developed for this study is lengthy, including some 216 separate questions which generated 357 variables in the coding frame. However, as with the Case Analysis Study, not all of these are relevant in every case. At

---

60 While there are not marked differences between men and women on facts: time married, issues in dispute, maintenance quantum etc., the accounts each gave of the marriage break up did often make it seem we were talking about two different marriages.

the same time, if an individual had been to mediation, been represented by a lawyer, attended court, is involved in an access, custody and maintenance arrangement and is "repartnered" or has an ex-spouse in this situation, the interview could take a considerable time to complete. As the following list of areas covered in the interview suggest, our focus was on the divorce and separation process and the post-divorce situation of these families rather than the marriage itself and the reasons for the break up. But, in many instances, those we interviewed also wanted to talk about these aspects of their case and, indeed, it appeared that for some, this was the first opportunity to talk out the whole experience of marriage breakdown and divorce. The result is that along with a considerable body of quantitative data, we also have an equally large body of more qualitative case-type data which was written up and summarized by each of the researchers in the four sites.

Figure 1
Areas Covered in the Client Interview Study

I. Background data on client
II. Factual matters on previous marriage
III. Aspects of the separation
IV. Counselling and mediation
V. Legal representation
VI. Court hearing
VII. Legal process-provincial legislation
VIII. Legal processes-divorce cases
IX. Custody and access of children
X. Maintenance and standards of living
XI. Post-divorce relationships
XII. Repartnering
XIII. Post-divorce adjustment

OBSERVATIONAL STUDY

As noted above, since we knew in advance that, in some of the courts, it would be necessary to wait for sufficient cases to be generated and completed, we built into the research design an observational component. The intent was that the three researchers would carry out an essentially ethnographic or descriptive study at the same time as they were collecting quantitative and codable data from the court files. Terms of reference for this part of the research were left purposefully vague since, at the outset, it was unclear what degree of access we would have to mediation sessions and what issues would be specific to each court and community.

However, researchers were guided in their observations by the general set of questions which had been outlined and discussed in the Discussion Draft and the Request for Proposal. These were reiterated and expanded upon in meetings of the

research team and in individual discussions between researchers and the project manager during site visits. The result is that while the peculiarities of each court necessitated different approaches, all were asking essentially the same questions and focussing on the same general processes. At the same time, this component of the research is not, in the Bale's tradition, an "interaction process analysis" type of investigation. That would have required a very different research design and researchers with very different expertise.

As the lengthy descriptions in Part 4 will attest, we believe that the observational component was a useful exercise, one which has done much to enrich our quantitative data and our general understanding of court-based mediation services and their place and relationship within the court system. But, we would caution that, as with our attempt with the client interview data to "flesh out" the statistics, we regard this as a useful but supplementary data source.

As is described in Part 4, we have the most complete observational data for Saskatoon and Montreal. There both researchers were able to observe mediation in process and to discuss specific cases with the mediators or counsellors. For reasons beyond our control, mainly the abrupt change in court staff, we have very limited observational data on St. John's (this component of the research was not done in Ottawa).

SUPPLEMENTARY STUDIES

Included in the project were two supplementary studies, one of family law practitioners and the other of divorce mediators across Canada. The intent of both studies was to move beyond the three research sites and to explore lawyers' and mediators' attitudes about divorce and separation, problems in reaching settlement, differences between the two groups in attitudes about divorce mediation and the nature of interaction between the two professions. In addition, we borrowed heavily from a series of questions developed by Kenneth Kressel in his study of Maryland lawyers.[61] The main difference is that, where relevant, we put the same set of questions to both lawyers and mediators (results are outlined in Part 4).

The Lawyer Study

The first phase of the Lawyer Study involved relatively unstructured interviews with about 60 family law practitioners spread over the three mediation research sites. We say "about" for two reasons. First, having made an appointment to see one

---

61 Kenneth Kressel, The Process of Divorce, New York: Basic Books, 1985.

lawyer, we sometimes found, on arrival, two or more members of the firm who wanted to meet with us and give us their views on mediation and family law, generally. So, it was sometimes unclear whether this should comprise one or two or three interviews. And, second, particularly in Saskatoon, the researcher, in addition to formal interviews, had a number of discussions with both private-practice and legal-aid lawyers which dealt with many of the concerns of this study.

There were two objectives in conducting these interviews. The first was to learn more, in each of the communities, about the interaction between the legal profession and the court and non-court based mediation services. Second, we wanted to use the data from these interviews as the basis for a more structured mail survey to family law practitioners across Canada. The Canadian Bar Association maintains a list of about 6000 lawyers "who have expressed an interest in family law." On our behalf, the CBA drew a one-sixth sample of these lawyers -- ie: 1000 names -- and mailed our questionnaire and covering letter to them. Using their own internal system, a translated version of the questionnaire was sent to those members who have indicated that they wish to receive communications in French.

Although cheaper than interviewing, mail surveys suffer from the major drawback that they typically result in a low response rate. This was also true of the Lawyer Study. In all, we received back only 220 completed questionnaires, a response rate of 22 percent. In addition, another 18 lawyers were courteous enough to write and advise that, while interested in family law, they do not practice it (usually because they work in a government agency) and therefore felt unable to complete the questionnaire. This is a disappointing response rate and ordinarily we would use the data with extreme caution. At the same time, as we describe in more detail in Part 4, the findings from the mail survey are very close, in the important respects, to what we learned from the personal interviews in the three research sites. If there are biases in our sample, we are unable to ascertain what they are or in what direction they might lie. Thus, despite the low response rate, we are reasonably confident that these data give an accurate portrait of family law practitioners in Canada.

The Divorce Mediation Study

Given that there are only a handful of private practitioners offering divorce mediation in the two smaller research sites, we did not conduct unstructured interviews before developing the

questionnaire to be sent to divorce mediators across Canada.[62] Our sampling frame for the mail questionnaire was the latest version of the Inventory of Divorce Mediation and Reconciliation Services in Canada, which has been assembled by the Department of Justice, Canada. In all, we sent out about 450 questionnaires and received back 187 completed questionnaires. At first glance, this appears to be a response rate of approximately 44 percent. However, the address list provided us by the Department sometimes lists individuals and other times agencies. Where an agency was listed, we sent several questionnaires and asked that they be distributed to staff members. It is quite possible that, in some cases, we sent more questionnaires than there was staff.[63] In short, we do not know exactly what was the overall response rate. And, it should be noted that the sampling frame we were using is not exhaustive of all people in Canada who are practicing divorce mediation. As is discussed in Part 4, there is a remote possibility that there are people offering divorce mediation, who, for various reasons, do not wish to have their names included in the inventory. We would hasten to add that we think this is unlikely; we did not hear in our three research sites of individuals doing mediation who are not included in the inventory.

DATA PRESENTATION

This project has generated a considerable and complicated data base, one which is impossible to exploit fully in one general descriptive report. In addition to sheer quantity of data, there are, as noted above, a number of sub-groups which often must be analyzed separately. For example, requirements of the mediation study made it essential that we include separation cases under provincial legislation since these make up a considerable proportion of the caseload of court-based mediation

---

62 In St.John's one of the more active mediators outside of the court was, in fact, attached to the project. Over the course of the research, researchers met and talked with most of those, in the smaller sites, who are doing mediation. In Montreal, the part-time consultant to the project does mediation and also offers a course to his social work students. He is married to the Montreal researcher on this project so that over the course of the research, she had an opportunity to meet and talk with a number of the people offering divorce mediation in Montreal. In addition, the project manager and, at times, most of the research team, have attended a number of conferences over the past two years devoted, in whole or in part, to divorce mediation.

63 Indeed, one administrator in British Columbia, worried no doubt, about the deforestation of his province, very kindly sent us back the unneeded copies of the questionnaire.

and counselling services but have little or no relevance for the divorce evaluation component of the project.

Within both the divorce and separation cases are a number of sub-groups which often merit separate attention: contested versus uncontested cases; wife versus husband as petitioner; divorces with and without dependent children and so on. These and other sub-groups are replicated over four separate research sites, differing, at times, in procedures and perhaps even culture. And, when we turn to the client interview data, it is obvious that we are almost always dealing with two basic groups: the experience of women who usually have custody of the children and the experiences of men who usually do not. Moreover, while the numbers are small, there are the different experiences of men who have legal and physical custody of the children of the marriage and the mothers who are placed in the role of a non-custodial parent.

From the point of view of an outcome and process evaluation of divorce mediation, we are, throughout, comparing those who attended mediation and separation counselling sessions with those who did not. But, it should be stressed that we do not have a classical experimental research design in which there is prior randomization as to who goes into the "experimental" group and who goes into the "control" group. As discussed in some length in the Discussion Draft which preceded this project, such a design is unfeasible and unethical in a publicly funded service. That is, in the interests of science, one cannot deny people a public service. And, at present, one cannot force people to use a service they do not want. The problem, then, as in all research is one of self-selection: it is possible that those who choose to use a particular service differ in important ways from those who choose not to do so and that observed differences are not the result of the test factor (in this case mediation) but some other factor.

The way around this problem is what is known as a quasi-experimental research design. The researcher attempts to control for as many extraneous factors as is possible or he or she can think of. For example, as we find, those who attend mediation are better off financially than those who do not. Thus, differences in amount of maintenance may be a result of higher incomes and have nothing to do with mediation. One, then "controls" for income and looks to see whether the same differences persist at various income levels. More generally, we have sought, throughout our analysis of the data to test for other factors which might account for differences in outcomes between mediation and non-mediation cases. But, it remains the case that without prior randomization we can never know for certain that there is a causal relationship between observed outcome and mediation.

All data reported here were analyzed using version 2.1 of the SPSSX programme (Statistical Package for the Social Sciences). Although this programme offers a wide array of relatively sophisticated multivariate procedures, we have relied mainly on the more basic procedures of frequency distributions, means (condescriptives), cross-tabulations and breakdowns of the entire sample of cases or, more usually, the sub-files described above. Except where means are used, all tables are based on percentages. Because of the number of sub-files and breakdowns employed in this analysis, the number of cases on which each percentage is based are not, ordinarily, provided. The exception is where a particular sub-file is extremely small and, in our view, percentage differences are apt to be misleading.

SPSSX can, for most procedures, very easily provide appropriate tests of statistical significance, and these were run for cross-tabulations and breakdowns. However, for several reasons, these are not presented in the following tables. The main reason for not doing so is that tests of statistical significance are based on the assumption that the sample under analysis is a random sample of some larger population. The purpose of such tests is, then, to give the researcher an indication of the probability that the observed findings are not due to chance or sampling fluctuation and can be generalized to the larger population from which the sample was drawn. In this particular project, it is not clear what purpose or meaning such tests serve since, in most instances, observed differences are actual differences which cannot be generalized to some larger population -- eg: all divorces in Canada. The exceptions are Montreal and Ottawa for uncontested divorce cases.

Second, in a report of this nature, there is the danger that, even if tests of statistical significance are used appropriately, the phrase "statistically significant" is likely to be interpreted to mean "substantially significant". Since the larger the sample, the more likely it is that observed differences between sub-groups will reach some acceptable level of statistical significance, we cannot assume that the differences are also of substantive importance. For example, in a very large sample, even differences as small as one or two percent may be statistically significant but it is apparent that one would not want to make policy changes on the basis of this small of a difference.

In conclusion, we would note that there is, inevitably, a tension and degree of frustration in social science research which is impossible to resolve fully. On the one hand, there is a need for good systematic statistics which tell us, in gross terms, what is happening and which, in some instances, allow us to test hypotheses -- the discovery of relationships which have a known level of confidence that they are generalizable because they are based on a large and representative sample. On the

other hand, it is almost impossible to do social research and not collect a wealth of descriptive, qualitative and, sometimes, purely subjective information that the researcher takes in almost subliminally in the process of collecting quantitative data. Case type data always make more interesting reading but they cannot be generalized and, when put in the context of the quantitative data, may turn out to be the result of a selective perception; people tend to remember the unusual and to ignore or forget the routine.

All of this takes on greater urgency when the research has taken place in several research sites and the principal author is located in none of them and must, to a large extent, rely on second-hand accounts of the knowledge gained by researchers through their day to day research activities. This project was conceived with this tension in mind. As with other research projects, the principal goal was to collect basic statistical data amenable to coding and to statistical analysis. But, we also wanted to flesh out the bare bones of these statistics with qualitative, even impressionistic data.

We have, then, tried to pull out of each of the researchers, not only the coded data, but also their impressions, their feelings, their perceptions as to what was going on but cannot be reduced to numbers. Thus, in addition to the Observation Study, each researcher has also prepared a qualitative report on the interviews with clients. We draw upon these impressions at various points in this report and will do so in greater detail in further publications. We turn, now to a description of the mediation process.

PART IV: PROCESS ISSUES

INTRODUCTION

The focus of this research is court-based mediation and counselling services. This first section describes, in some detail, the three research sites, the different approaches offered by the three court-based mediation services and, in general, addresses the process or descriptive questions posed in the initial proposal. Initially, the intent was to study divorce mediation in three quite different kinds of communities. But, as the following pages reveal, in terms of scale of operation and kinds of services two of the research sites--Saskatoon and St John's--have much in common. In particular, as unified family courts, both serve jurisdictions roughly similar in size and not all that different in terms of the economic situation of many of the clients. And, while both offer divorce mediation, this must compete and often take second place to a variety of other activities--intake, information sessions, short-term counselling and court-ordered custody investigations--which fall upon all members of the social arms of the two courts. In contrast is the Montreal court described in some detail in the following pages.

THE MEDIATION RESEARCH SITES

The Montreal Court

The Physical Context

In its structure and approach, the Montreal Court and mediation service is set apart from the other two sites and services and from all other courts in Canada. But, the most apparent difference, one that makes it an anomaly among family courts, is the sheer scale of operation. During 1985, when our research began, the Family Division of the Supreme Court in Montreal heard some 516 contested divorce cases as well as 95 contested separation cases, for a total of 611 contested cases heard on grounds of merit. The Court also dealt with 6484 uncontested divorce cases and 2045 uncontested separation cases for a total of 8529 uncontested cases heard for a Decree Nisi or a final judgement of separation. Over this period 15,314 court orders were rendered which were made up of 3,549 interim or variation orders on contested petitions, 3405 interim - interim orders and 9360 interim or variation orders on uncontested petitions. Annually, including petitions for a decree absolute or special matters (presented before a judge in chamber), over 44,000 petitions were registered in 1985. By way of contrast, this immense court handles nearly as many cases in a week as are dealt with in a whole year in Saskatoon and St. John's.

Eight court rooms are given over to the Practice Division of the Chambre de la famille and four court rooms are used for hearings of family cases proceeding on the grounds for merit. Ninety judges are Superior Court judges, most of whom are regularly called upon to judge family cases. They rotate and usually spend a three month term at the Family Division of the Court in a given year. They can state their preferences to the Chief Justice as to how much Family law they want to do and some of them are appointed for a longer term, 6 months, for example. A small number of judges do mostly family law and one female judge does strictly family law. As well, a special protonotary hears all the uncontested petitions for interim or variation orders where there is a mutual agreement signed by both parties. The protonotary has the power to sanction these agreements.

Registration of the files and procedures is completely computerized so that one can read the history of a case on the computer. Moreover, most court rooms are equipped with an automatic recording system. Handling the files and storing them are also highly technical operations that require the work of several employees. The first level basement at the Court house resembles a vast warehouse comprising many rooms lined with rows and rows of shelves where files rest when cases are closed or inactive. There used to be a carrier belt system to move these files from one department of the courthouse to another, until it was discovered that a number of "thin" files were slipping from the belt into the spaces in between walls and ceilings.

As one would expect, the making of the docket and the coordination of the different courtrooms are highly technical and complex operations which involve the constant coordination and synchronization of the work of many judiciary technicians. Every morning, dozens of lawyers invade the counter at the office of the "master of the docket", each of them wanting a particular court date to proceed, each of them representing some particularities of his or her case and needing to be heard. The place sometimes looks like the ticket counter of a busy airport, with phones ringing and computer screens sending out information to lawyers in the adjoining area.

Physically, the court is, itself, imposing and intimidating, lodged as it is in a 17 story building having some 60 different government services. Thus, the first task for someone approaching the court is to find out where to go. The second task, sometimes, is to find one's lawyer amongst the crowds in the corridors leading to the different courtrooms. At times, the feeling is of being in a bus depot or police station on a busy night.

Before 1982, hearings were public and people waited inside the courtrooms. Now that the hearings are private, the space inside the courtrooms is not fully used and the corridors are

jammed with people smoking, pacing nervously or sitting side by side with their lawyers trying to discuss last minute matters. Some lawyers chat in a friendly manner while others are running back and forth between different courtrooms to settle different cases. The atmosphere in the waiting areas is also sometimes charged with a high degree of hostility when the court adjourns and the adverse parties find themselves pacing the same area, a few feet apart. Often the air is thick with anger and a variety of drama occurs regularly.

The Legal Context

Judges, it seems, are continually working on ways to define what is meant by the notion of the best interest of the child. Judges we have spoken with or observed in action in custody cases seem in agreement about the importance of the child having access to both parents and most put considerable effort into stressing this point to parents. They seem to be also very aware of the importance of creating tolerance and conciliation between the parents and evidence this in court by encouraging the parties to forget their hostility and to concentrate on being more cooperative in the best interest of their children.

As well, we have observed some judges chastise lawyers for embittering the situation by using certain strategies. They try to convey to lawyers the idea that they must take into account not only their client's interests, but also the common interests of the family in conflict. Some judges try to convince the two parents disputing custody that the judgment will not be based on the parents' merits but on the child's needs. At times, attitudes of the judges seem in sharp contrast to the strategies of lawyers bent on diminishing the credibility and competence of the other party.

One other criteria apparently recognized by judges with respect to the best interest of the child, is concern with creating stability in the lives of children. This emerges most clearly in cases where a parent is disputing custody a long time after an interim judgment has been rendered or a long time after the parent has had "de facto" custody of the child. Thus, the court rarely changes a situation of custody. In cases where custody was initially uncontested by the parents, the court apparently assumes that the initial decision on custody was equitable and taken in the best interest of the child. It will only examine the change of circumstances since the time of the original agreement. Our experience is that there has to be strong evidence against the parent who has had custody of the child ; it is not sufficient to establish that the other parent is now able to take good care of his or her child. In uncontested cases, little time or effort is spent verifying the quality of agreements signed by the parties in regard to custody or access. There is, rather, more scrutiny of the maintenance

agreement. The court makes sure husbands pay a sufficient amount in cases where the wife is on social assistance.

In cases where custody and access are in dispute, and where experts are called in to assess which parent is better able to fulfill the needs of his or her child, judges apparently give the experts recommendation great consideration and mostly go along with what is recommended. It is, then, left to the expert in human sciences to assess what is in a child's best interest.

The Family Mediation Service

The first mediation service in the Province of Quebec was created in Montreal in February 1981. It was, at first, a pilot-project for the judicial district of Montreal. Due to the importance and the implications of mediation, numerous institutions were involved at the outset, including:

- the Ministry of Justice (Quebec);
- the Ministry of Social Affairs;
- the Bar of Montreal;
- the sub-committee on the practice of Family Law of the Bar of Montreal;
- the Community Legal Aid Centre of Montreal; and
- the Social Service Centre of Greater Montreal.

These institutions worked out specific procedures for mediation and gave the mandate to set up the Family Mediation Service (F.M.S.) to the Social Service Centre of greater Montreal. The F.M.S. became a permanent programme on April 1, 1984.

The F.M.S. is a public service with full governmental funding, and is situated in the new Courthouse in Old Montreal. Although it is a court-connected service, it is independent of the Court in the sense that the mandate given to the mediator comes from the couple. The F.M.S. is first of all accountable to the clients it serves. The Service is available to all, free of charge regardless of income level, as long as one of the spouses resides in the judicial district of Montreal. Priority is given to couples with children. The general objectives of the Service are twofold:

a) to help couples avoid unnecessary separations and minimize the effects of potential separations; and

b) to help couples reach a just and equitable agreement in the matters of custody, access, support and property division.

The model is further characterized by being "closed". This means that nothing said or written during the mediation process is admissible as evidence in Court, unless both parties give their consent. In other words, the mediator cannot be compelled to testify in Court. Those working in the service believe that success of mediation depends upon the expectation of privacy and confidentiality. Since mediation is voluntary, all parties involved can withdraw from the process at any time.

The model is described as "multi-disciplinary" and the approach as "systemic". The presence, on a permanent basis, of an attorney acting as a legal consultant for the mediators and the couple during the mediation process is an important component of the service and one of the features that make the Montreal system unique in Canada. The attorney is a Legal Aid lawyer appointed by the Community Legal Aid Centre of Montreal and mandated by the President of the Bar of Montreal. Moreover, the Service promotes the involvement of various and diverse professions during the mediation process. Couples will be encouraged to consult experts in different fields should the need arise. Another unique feature is that the Montreal model is also characterized by what is, in the service, called "global mediation": mediators help couples negotiate not only custody and access, but also support and property issues.

Presently, the staff is composed of six mediators (3 women and 3 men), an intake worker, a coordinator, a lawyer-consultant and one secretary. The staff is multi-lingual and multi-cultural. Mediation can be done in French, English, Italian or Spanish. All the mediators and the intake worker are professionals of the mental health sciences, with academic backgrounds in either social work or psychology and have a long background in family dynamics. There is a wide acceptance of the systems theory as a way of understanding family and individual behaviour. All draw on a number of years in the practice of family or individual counselling. As well, some mediators have trained with Dr. John Haynes of the American Academy of Family Mediators while others trained with a private mediator who herself was trained by John Haynes.

There are regular consultation meetings between mediators and the lawyer where all kinds of information--fiscal, financial, legal, and so on--are shared and discussed. The lawyer-consultant is involved at different stages of a case and can be called upon to clarify the legal implications of a given situation. There is on-going consultation between some mediators and the lawyer-consultant regarding clinical issues and intervention strategies.

The mediators are expected to be familiar with family law and with the legal process in order to work with couples within the parameters of the legal system and to recognize when to refer

clients to lawyers of the clients' choice. Because of their involvement with financial matters, mediators are also familiar with accounting procedures and have a general understanding of tax law. All this information enables them to help clients develop realistic budgets and to handle properly their assets and their debts.

Between 1981 and 1985, the F.M.S. has dealt with approximately 1400 cases. To put this into context, during this period, some 60,000 new matrimonial cases were registered with the Montreal Court. In other words, about 2.3 percent of the total workload of the court has, in some way, been affected by the existence of the mediation service. During the period studied (November 1984 to September 1985) the service handled 272 mediation cases, 82 of what are called consultation on decision making cases and "pre-mediation" cases. While the main focus is on mediation, the F.M.S. offers a number of services. Of particular importance is intake.

Intake

The intake worker's responsibility is two-fold. She does the intake for the Psycho-social Assessment Service as well as for the Family Mediation Service. She is accountable to the Court and is constantly called upon by judges for custody investigation orders. Her function at the F.M.S. consists of receiving all phone calls and making necessary referrals, screening over the phone all requests for mediation, inviting couples to group information sessions held weekly and co-leading these information/intake sessions with a mediator. For court cases--cases referred by a judge or by lawyers after the initiation of procedures--the clients and their respective attorneys are seen immediately by a mediator or by the intake worker for a first interview. Generally, the F.M.S. requires that both spouses come willingly to the Service and at least one must have taken the decision to separate. The request has to be made jointly for a minimum chance of success. If only one spouse is requesting the service of a mediator, he or she will be responsible for bringing in the other one.

An average of 10 couples attend the group intake session. One can notice a sizeable difference in the behaviour of the couples at the beginning of the session and at the end of the session. At the beginning, the couples often don't move, talk, face or look at one another. At the end, they look more relaxed, they move, turn to each other and exchange information. The review, itself, is fairly structured. There is first, some small talk before everyone has arrived and to help relax the atmosphere. Some pamphlets are also distributed. The mediator and the intake worker start the meeting by explaining briefly their respective roles. After asking people how they learned about the Service, they describe the objectives and structure of

the meeting. They stress that they are not there to offer judicial information and recommend rather that people seek that kind of information from their attorneys. They are also told that the lawyer of the service will be available for that type of information.

Mediation is presented as an option offered to couples who want to minimize the negative effects of separation. The emphasis is put on people's ability to decide matters regarding their own life and that of their children, on more effective communication between the couple and on the negotiation of an agreement that will serve the interests of all members of the family. There follows the presentation of a video on mediation. This video informs people about the different steps of the mediation process through a fictional story. This is followed by a question-answer period. The couples are informed about the limits of mediation and of the maturity and efforts required. It is stressed again that mediation is an alternative not suitable to all. The participants are invited to express their comments in writing at the end of the session and to apply for services if they so desire.

Participants' comments are generally positive; they appreciate the clarity of the information, the human character of the session and the climate of confidence created during the meeting. Most of the questions are about the role of the lawyer in mediation and the process of legalizing an agreement. It is of interest that some show disagreement with the strong emphasis put by the service on the importance of consulting a lawyer, since as they sometimes point out, the whole point of coming to mediation was to avoid dealing with lawyers.

Our sense is that the group process, in itself, seems to be therapeutic for the participants; it makes them more aware that other couples experience the same difficulties they do. It facilitates and stimulates an exchange between the couples and creates an atmosphere of hope in the possibility of the resolution of conflicts on a basis of good faith. Members of the F.M.S. also point out that the group intake also saves the intake worker time since otherwise she would have to give out the same information individually. The mediators have noticed that since the introduction of this new intake system, the screening of eventual clients is more thorough, and it saves them time during the first interview; they can skip giving a lengthy information session and spend more time assessing the particular situation of the individual couple.

Some persons consult individually for help in reaching a decision about the termination of the marriage. The intake worker will sometimes render the service herself over one or two interviews, or will refer the case to the coordinator who will assign a mediator. A "decision taking" file will be opened as

opposed to a mediation file. The aim of the service offered is to help families avoid unnecessary separations. The couple or a spouse is helped to "thoroughly explore all the options available in order to verify the viability of the conjugal bond." If the decision is to reconcile, and if the couple wishes to undertake marriage counselling, a referral is made to the appropriate service in either the public or private sector.[64] If the decision reached is to end the marriage, both spouses, if willing, will be transferred to another mediator for pre-mediation or mediation "per se".

Pre-mediation

Although it had been included in the Protocol of Agreement between the Court and the Social Service Center, short term divorce counselling has never been offered by the F.M.S. It was argued by the Social service center that this kind of help was already provided by another department and it did not want a duplication of this service. However, mediators learned from experience that some kind of help that one can call neither mediation nor divorce counselling is often needed.

Many couples come to the F.M.S. without having had any divorce counselling. A first interview will sometimes bring forth the lack of readiness of one or both parties, to enter mediation and negotiate, even though they have expressed a willingness to do so. When some emotional conflicts which will hinder the mediation process are identified, the mediator offers pre-mediation. It consists of one or two interviews, joint or individual, according to the needs expressed, where the mediator aims at helping the spouse(s) to accept the decision that the marriage is over: it starts the process of separating emotionally. Sometimes the result is to help the couple decide who will leave home and how.

Pre-mediation is a new approach, started in July 1985. There were just a few pre-mediation files (5 cases) opened between July 1985 and September 1985, and the line is very thin between divorce counselling and pre-mediation. The mediators are still defining and inventing their intervention as pre-mediators. There are no strict criteria on the basis of which a case will be classified as a mediation case or as a pre-mediation case and mediators have had to call upon their experience of the different types of couples and the different emotional stages of separation to recognize the need for pre-mediation.

---

64 In practice, this, at present, means the private sector since services in the public sector are extremely limited. Thus, some of those unable to afford private counselling return at a later point to mediate the end of their marriage.

The Mediation Process

Mediation is offered to couples at any stage of the uncoupling process. Some are still living together while they attend mediation sessions, while others have been separated for a number of years. About half of the couples have already consulted a lawyer before entering mediation. Also, couples may be at different stages of the judicial process: some consult the service after a court judgment while others have yet to enter into the judicial process.

Usually, in the first stage of mediation, the mediator assesses the willingness and readiness of the couple to enter mediation and identifies with them specific issues to be mediated. Defining the issues to be mediated is done jointly by the couple and the mediator. When the couple is working towards a first agreement on all issues, they are encouraged to enter all the matters in the mediation contract even the ones on which they have already come to terms. The review of all the issues proves necessary because couples have not usually considered or foreseen all the aspects or possible consequences of their arrangements and they may eventually want to change some details or be helped to formulate their intentions more clearly.

As mediators have learned, and we have observed, a statement of agreement on a specific issue at the beginning of mediation may sometimes reflect an erroneous perception of the other partner's expectations or commitment on that issue. It may be the expression of a wish to agree more than a real agreement. Often, one of the spouses will gain strength in expressing his or her needs and will no longer be in agreement on issues the other partner thought were no longer in dispute.

The mediator, at the first stage, explains the basic rules governing the process of mediation and establishes a "contract" between the Service and the clients. He or she assigns to the couple the tasks of consulting with their own individual lawyers and stresses to them the importance of knowing what their individual rights are. The mediator also gives out budget forms for the couple to fill out in cases where finances will be mediated.

The first stage is viewed by mediators as crucial because it is at this point that a number of tasks are, hopefully accomplished. First they take control of the process and set a climate of trust and cooperation by showing respect and acceptance of both clients and giving equal attention and consideration to each. Second, this stage is the opportunity to give reassurance that the difficult tasks ahead are feasible. Third, the mediator tries to break down the complexity of the situation faced by the couple into manageable elements and reassure the couple that their many concerns will be addressed

and dealt with one by one. Finally, this stage gives the mediator the chance to remind the couple that it is possible to make partial temporary agreements, with the option of revising them in the course of the process. All of this contributes to a lessening of the confusion and anxiety often experienced and displayed by the separating spouses.

Mediators invite the couple to each express their thoughts and feelings about the separation, to present their view of how the decision to separate has been reached. They explore perceptions of their mode of communication and at the same time assess their actual on-going style of communication. In often subtle ways dysfunctional patterns of communication are discouraged without setting blame on any participant. On the contrary, our experience is that mediators work hard to enhance the self-esteem of both spouses. They do so by indicating to them any positive behaviour demonstrated during the session(s), by pointing out any accomplishments the clients have made towards an agreement and by generating hope that more can be accomplished-- that an agreement will eventually be reached on issues not yet resolved.

By the end of a first interview, the mediator usually has an idea of how to go about a case, whether it is mediable or not, whether the couple needs pre-mediation sessions or can tackle the tasks of mediation right now. It also happens that a couple will reconsider their decision on the break-up and attempt a reconciliation. A high proportion of such couples come back to mediation after a period of time. This has brought the mediators to the conclusion that there is little one can do to help couples reconcile after they have decided to separate. The lack of public marital counselling services in the community also lessens the likelihood of long term reconciliation for couples who could, perhaps benefit from such services.

One mediator said he used to refuse mediation to couples who in his view showed no evidence of a real conviction or desire to separate. If the couple insisted that they wanted mediation, he would refer them to another mediator. More recently he has changed his view and will accept this type of couple because he now believes that mediation serves a useful purpose, whether the couple decides to reconcile or not in the future. However, he will carefully probe with them any uncertainty about their decision.

Another mediator views separation and divorce as a human catastrophe, socially, psychologically, and financially. He puts much emphasis on helping create a sound restructuring of the after divorce family unit and to maintaining and strengthening of parent-child relationships after the marriage breakdown. He wants people to realize that some odd reactions or strong conflictual emotions are normal and situational. Other mediators seem to view separation more positively, as a new beginning for

the individuals. They tend to convey this perspective to their clients and encourage them to look ahead with hope and to start to think about how to reconstruct their lives.

As we found, mediators are very cautious in their prediction about the evolution of a case. Their experience has taught them to expect everything and anything. They work in the here and now, on the process of what is happening as it happens, because there are often sudden reversals in one of the spouse's attitudes as he or she goes through different emotional stages. In other words, a case that seems very easy at the start may turn out to be a very difficult one or vice-versa.

Mediability of Cases

Nevertheless, over time, mediators have identified a number of factors which suggest to them a better likelihood of mediating a settlement:

- a certain degree of acceptance of the break-up by both spouses;
- a minimum of maturity and a personal capacity "objectivize" one's situation;
- an ability to draw on past experiences to grow and move on. (usually if one of the spouses has this personal capacity, the couple can be helped to achieve an agreement on issues initially well-contested);
- the motivation and/or will to achieve an agreement;
- a minimum of trust in the other spouse;
- good timing and some receptiveness; (one mediator feels that the most contested cases are not necessarily the most difficult ones to mediate; the polarization of issues is not a definite sign of a stalemate. There can be a great divergence of views on one or several matters or even dramatic circumstances such as harassment or brutality. If people have reached a stage where they have suffered enough and exhausted all means at their disposition to solve their conflicts, they are more receptive, ready to explore new avenues to find relief and a solution to their dispute).

Contested Cases: Mediators' Views

Thus, cases vary in terms of degree of difficulty. Indeed contested cases--those difficult to tackle or impossible to deal with without some pre-mediation intervention--are defined by mediators in a variety of ways:

- "A contested case is a court case where legal proceedings have been initiated; most court cases are contested ones, especially post-judgment cases";

- "A contested case is a case where two parents show extreme differences in their moral values or religious beliefs; this leads to conflicts of access";

- "A contested case is a case where one parent shows no interest whatsoever in his or her children; this leads to lack of implication in access rights";

- "A contested case is a case where there is fear and violence";

- "A contested case is a case where there is an absence of a minimum of trust in the other spouse as a parent; it leads to conflicts on access and maintenance";

- "A contested case is a case where there a strong desire of vengeance on the part of one spouse who perceives she/he is abandoned for a new partner. This often leads to an impossibility of compromising on division of property";

- "A contested case is one in which minds are set and positions are extreme";

- "A contested case is often equated with multiple problem families already involved with social services or the Youth Protection Service";

- "A contested case is one in which spouses don't agree on legal procedures, one wants a divorce, the other one wants a separation";

- "A contested case is one where parents are disputing custody";

- "A contested case is one where spouses can't agree on a basic principle of division of property";

- "A contested case is sometimes one where there seems to be an agreement about ending the marriage but this agreement is only lip-service: this leads to a pseudo-accord that can be sabotaged at any point".

The second stage of mediation concentrates on the needs of the children and the discussion of living arrangements for them. This stage focuses mainly on custody and access and questions

regarding the best interest of the child. Mediators agree that they rarely get a case where custody is formally contested. Parents usually arrive in mediation with a good idea about whom their child or children are going to live with. They make the decision and the mediator respects it. What the mediator insists on is the advantage to a child of shared parental responsibilities, of both parents remaining decision makers for their child and of their consulting with each other on major decisions affecting their children's life. As we see more clearly in Part V, the result is usually an agreement of joint custody.

There is, in any event, full agreement among mediators that it is in the best interest of the child to have maximum access to both parents. They do, however, vary in their opinions about the nature of physical custody. Some believe that a week-end or two plus one day or night a week is a good access arrangement while others believe in equal physical custody. As a result, the policy is not to impose any specific physical arrangements, but, usually, to accept the parents' proposed or de facto arrangement. If the arrangements have been made prior to coming to mediation, the mediator will have the parents talk about how they reached their agreement and about their perception of their child's best interest.

When parents have not made a decision, mediators try to help people assess the characteristics of their relationship with their children and to discover the needs of a particular child. An effort is also made to differentiate between the needs of the child and the parents' needs and to sort out the "true" feelings and needs of the children from the strategies displayed by the child in reaction to the separation. Finally, mediators introduce the parents to the variety of potential parenting arrangements following separation.

Mediating Finances

As noted earlier, one of the unique features of the F.M.S. is that mediators deal with financial matters as well as custody and access. Indeed, in the minds of the mediators, maintenance cannot be dissociated from decisions about custody and access. When treating finances, the policy of the Service is to offer mediation on division of property as well as on maintenance. The idea is to give clients the opportunity to finalize their separation and to settle all matters.

Mediation of financial issues follows a very structured pattern. The F.M.S. uses its own forms for financial statements. The forms are given out to each spouse towards the end of the first interview. Clients must fill them out themselves at home to the best of their ability and consult and help each other in doing this important task. They are urged to seek help from third parties if needed. All assets and debts must be disclosed

and listed and the couple also is asked to make a budget on the basis of their present income and expenses. A budget of expenses for the children is completed as well. However, what makes this service unique is that the first decision on finances may very well be with respect to division of property.

It is here, particularly, that the lawyer of the Service plays a significant role. He is called upon to explain to clients the legal implications of their marriage contract and the meaning of different legal terms. He answers their many questions on how to assess the values of certain pieces of property and answers other questions which arise about the division of property. When the couple does not know who will keep the conjugal home, the mediator may ask them to make two different budgets, one as if they were living in the house, the other as if they lived in an apartment. In other words, everything is done to help the couple gain better understanding of their different options, and of their financial needs and resources.

If a decision to sell the house is finally reached, spouses are urged to consult appropriate experts to complete the information they need before deciding how to divide their property. When they have all the information in hand, they determine the principle of division they will follow. Mediators work with a flipchart where they add and subtract each partner's assets and debts according to the figures and estimates agreed upon by the couple. This procedure makes it easier to calculate the total of net assets to divide between the two spouses according to the principle of equity chosen by them. Here again, the mediator will guide, encouraging the couple to go beyond the letter of the law and, in light of what their rights are, to determine their own principle of equity based on the needs of all members of the family and the sense of responsibility and good will of both spouses. One crucial element that renders that possible seems to be the quality or level of communication which the couple has attained at that point. The mediator has all along worked on improving their communication. The more direct communication has become, the less room there seems to be for distortion of messages and misinterpretation of intentions.

Negotiation starts once the principle of equity has been established. The mediator discusses with the lawyer all the technicalities of the possible ways of dividing the assets. The mediator and the lawyer may consult with each other between sessions to devise strategies to help the couple compromise and come to a satisfactory agreement on property. They discuss the balance of negotiating power in the couple and try to find ways to make it more equal. The couple is, in other words, encouraged to examine all possible solutions and their long-term consequences and to develop a variety of options before they make any decision on property division.

The amount of maintenance is calculated on the basis of needs on one side, and the ability to pay on the other taking into account the division of property. In cases where the parents share custody of their children, they will usually share the day to day expenses for the children according to the time they spend with them. The extraordinary expenses will be in a proportion based on each parent's income. In cases where both parents work and one parent has physical custody of the children, the whole of the expenses for the children will be shared at the "pro-rata" of each parent's salary.

Financial support of the children is a legal obligation for both parents and it is, therefore, kept in mind in mediation that the amount of maintenance is constrained by what is occurring generally within the Court. Thus, men have no choice but to pay and to do so within a range of amounts that are likely to be considered equitable by the Court. The uncertainty of a court settlement on maintenance motivates the couple to decide what is equitable to them within the parameters of the law. The structured process of establishing the amount of maintenance is as follows: the two spouses each make out their own budget and take turns in exposing them to the other souse and to the mediator. Each budget is then discussed or criticized by the other spouse. Once the budgets have been revised and mutually accepted, the calculation of an exact amount of maintenance begins.

Here again the mediator will use the flipchart to calculate the net total income of each spouse. The lawyer helps in especially complex situations but the mediators are usually capable to do these calculations themselves, and may check their budgets with their own accountants. Income tax reports and paycheque stubs are brought as tools to assess income. The mediators use special tax charts to estimate the fiscal impact of different amounts of maintenance for the two spouses, according to the basic income of the spouse who pays maintenance. These charts, built by a large accounting firm, were made available to Legal Aid in 1984 and later introduced to the F.M.S. by the consultant-lawyer.

Interrelationship of Issues

The different stages of mediation in this model of total mediation overlap and there is often a movement back and forth between the different issues discussed. The situation of the separating family is complex and the psycho -social elements appear intertwined with the financial and legal elements. Parents want to know about the legal and fiscal consequences of different custody arrangements and decisions about the family residence and the division of the furniture become related to issues of custody of the children. The calculation of the amount of maintenance takes into account the amount of time spent by the

children with each parent. When finances are discussed, the situation of a woman having to retrain and to go out on the job market is assessed concurrently with her responsibilities towards her children.

If an agreement on finances falls through, the agreement on custody and access is often jeopardized. Couples in conflict tend to use the children as leverage in the process of negotiating financial issues. The mediator has to help them keep the two issues separate and keep their priorities straight with respect to what affects the interests of the children.

At the F.M.S., mediation is a task-oriented process. The end goal is to achieve a memorandum of agreement on the issues identified by the couple and the mediator. Couples tend to stray from the task, in part because it is threatening to deal with conflictual issues, in part because it is difficult to deal with the drastic emotional burden of putting an end to the family. While mediators respect the pace set by the couple, they also remind them continually of the work to be accomplished and of the tendency to procrastinate and to avoid the unpleasantness of the final decision. The mediator in one observed case reminded us of a captain steering a small ship through a rough sea, guiding it calmly and surely to where the passengers had said they wanted to go, while the passengers themselves at times were subject to panic, inclined to forget the direction of the course and appeared to want to just close their eyes and scream. The "captain" kept assigning responsibilities for each to carry out during the voyage, specifically the tasks concerning decisions on access or maintenance.

In another case, the mediator seemed to be working at a different level. He was helping the couple deal with emotional conflict and their difficulties in communicating together. The mediator held interviews with the whole family and worked at restructuring the family dynamics. He had given different tasks to individual members of the family, such as filling out budget forms, discussing physical custody, etc. but the clients were not complying with the tasks. However, once the mediator helped remove the emotional blocks that kept the couple from working on the issues to be resolved and had helped the couple adapt to more functional patterns of communication, the spouses were able to free themselves from the influence of some family members and to use their own decision making power. The result was that they quickly came to a decision on custody/access and division of property. In that case, the mediator was able, in spite of the on-going issues, to help people come to an agreement that they could feel was theirs.

Thus, mediators work simultaneously at the task of resolving the issues of finances, custody and access as well as on the processes of uncoupling and restructuring relationships. Thus,

for the mediators of the F.M.S., items are not limited to reaching an agreement on all the issues but include helping the spouses to un-couple, and become financially and emotionally independent from one another. The objective is to enable the couple to learn new patterns of communication as past-partners in the best interest of their children. Mediators work on the process and the task at the same time; the task influencing the process and vice versa. In highly conflictual cases, a mediator may tighten the structure of his interventions, be more directive, give very specific tasks weekly to the couple, and as they accomplish these tasks hope that mutual trust will gradually be restored so that a longer term agreement can be made eventually.

Different mediators, it seems, have different levels of tolerance for the expression of emotions during a mediation session, and, as we were able to observe, the level of emotions can be very high at times. While mediators allow the couples to express hurt or anger, they generally control it by not encouraging it unduly or probing into feelings further when the degree of intensity is high. Rather, they encourage the person to come back to a more rational way of dealing with the task at hand, remind the couple of their objectives and warn them if they are slipping away from a civilized way of finding a mutually acceptable solution: the spectre of a court battle, of its high financial cost and highly detrimental psychological effects is used as a tool to maintain the couple's motivation to negotiate amicably; it calls them back to order.

As noted earlier, the lawyer-consultant services are available to the mediator and his or her clients at all stages of the mediation process. Usually, at the first stage, the lawyer joins the session to give out information about statutes, case law and the local judicial tradition. He will explain the difference between a legal separation and a divorce, and the implications of different matrimonial regimes. He also gives information on the court system and reminds clients of the broad discretion judges have in all family issues. The lawyer is responsible with the mediator for seeing that both parties understand the legal questions and their ramifications. The lawyer is often the one to suggest that clients be referred to private legal counsels. The lawyer is sometimes called into a session to find ways to evaluate assets appropriately. His presence often serves to bring in an objective input, since he is not as closely involved with the clients as the mediator. For couples whose mediator is a woman, the intervention of a male lawyer sometimes has the added benefit of making the balance of power more equal.

When an agreement is reached by the parties, a memorandum of agreement is drafted by the mediator. All the terms of the agreement are detailed and the mediator verifies with the clients

if it is a correct expression of their will. Every memorandum is reviewed by the lawyer of the service to ensure that everything is within the parameters of the law and presented in the right terminology. The clients who want to obtain a separation or divorce are instructed to present their memorandum of agreement to their lawyers who in turn will bring it to court. At the same time, it should be noted that the memorandum of agreement drafted by the F.M.S. is not signed by anyone and has no legal value, a matter of concern to some clients. There is a written reminder of this fact on the form used. Some mediators mail the memorandum of agreement to their clients; other prefer to hand it out to them during a last interview. In certain cases, children have been invited to hear the terms of the agreement that concern them and their questions ben be answered and questions of access or support clarified.

Protection of Women's Rights

Our observations suggest that people have plenty of room and freedom to criticize the mediator if they think the mediator is not being really neutral or impartial or is being misled by the other spouse. In a particular case, it was a long and arduous process for the couple to arrive at their agreement on property, especially the decision on the family home. The woman came back on a first agreement and had the discussion reopened. New arrangements were made that she found more acceptable and fair to her. It is obvious that some women feel at a loss in the negotiation of finances. Either because they lack knowledge of financial questions or assertiveness, or because they fear later hassle or conflict, or they feel guilty for leaving the marriage. The mediator and the lawyer of the Service go to great lengths to inform women properly, to elicit questions and offer the necessary information. They verify that the information is well understood on the assumption that the information increases the power to negotiate. Mediators tell women about their right to claim half the ex-husband's Quebec Pension Plan and the period of time within which they can apply for it.

They will let the couple change their budget if the spouses find out it does not fit reality, after a few weeks or more of experimentation. The aim is to strengthen the motivation of women to claim their just share by reminding the couple that the welfare of their children is at stake. They encourage both parties to think further than their immediate circumstances and to foresee the detrimental consequences of an agreement that would not be fair to the weaker party. They bring up the question of life insurance and suggest options that will protect the custodial parent: for example, it is suggested that the woman take out insurance on her husband's life to insure the support payments. If a woman cannot assert her needs and appears ready to give in too much for fear of reprisal or conflicts, she will be referred to her lawyer for legal advice; if she refuses

to consult or does not dare request what she feels she is entitled to, the mediator and the lawyer will refuse to endorse a memorandum of agreement on finance and will limit the agreement to a partial one on custody and access. Every strategy possible is explored and attempted by the mediator and every possible option suggested before the couple reaches that dead-end.

In the cases observed, it seemed that women became better informed and more capable to understand the different legal and financial aspects of their situation in the course of mediation. They also seemed to become more competent and more confident in themselves as they sought information and took on the responsibility to accomplish different tasks like consulting experts, such as notaries, lawyers and accountants.

Interaction with the Legal System

In a court of this size and complexity, it is probably not surprising that, in the course of our time in the Court, we encountered many staff and lawyers who were unaware of the F.M.S. or had vague and, sometimes, incorrect knowledge of its purpose. This despite considerable effort by mediators to make their presence known in the community and in the legal profession. Fortunately, one of the great admirers and allies of the service is Chief Justice Gold, who is, himself, a veteran and experienced mediator. Indeed, his influence has done much to keep the service in existence and to help it counter the opposition of at least some members of the Montreal Bar. The service also has a strong ally in the special protonotary who sanctions agreements in interim and variation orders. She particularly values mediation for women because she believes it better safeguards their rights. Too, judges we interviewed who are knowledgeable about the service also seem to appreciate what the service is trying to do and are supportive. Yet, at the same time, very few judges actually make referrals to the service. There appears to be several reasons for this.

First, as we learned from some of the judges, they are reluctant to interfere with lawyers' efforts at negotiating a settlement and are hesitant to go against the lawyers' wishes in a particular case. Second, by the time a case has reached court and all efforts at negotiation have failed to bring about an agreement, some judges think it now too late in the process to attempt mediation. Third, at the time of our research (and perhaps still) there was no set court regulation by which a judge can refer a case to mediation. While judges are empowered to order an assessment (a custody investigation) and, in fact, do so regularly in contested cases, it is less clear that they can actually order people to attempt to mediate their case. Finally, though judges are vaguely aware of the F.M.S., its separateness from the court means that it is not seen by them as a direct service of the court - a tool at their disposal - in the same way

as is the psychosocial assessment service. Thus, according to the coordinator of both services, a few judges tend to overuse the Investigation Service whereas the Mediation Service is still under used by the court.

The Mediation Service and Lawyers

Our general sense is that the two approaches, adversarial and mediation are viewed as opposed in nature and that it is, seemingly, very difficult for the two professions to understand and accept the other's model of intervention. Lawyers feel that mediation is an intrusion into their work, and mediators complain that lawyers are boycotting their intervention. For example, on occasions where mediators happened to discuss a case with a referring lawyer, they have expressed to us how appalled they have been at the enormous distance between their's and the lawyer's view of the case. They have found it very difficult to convey to the lawyers an understanding of mediation objectives and the essence of their work.

Thus, some mediators feel that the lack of knowledge of lawyers about mediation results in referrals to the service which are sometimes based on external circumstances more than on a judgement on the "mediability" of the case. It can be a "let's try this, I've heard it helps" decision to refer or a "let's go upstairs to the mediation service, since we've already waited two hours for our case to be heard." At the same time, a growing minority of lawyers do now seem to have greater understanding of the mediators' work and do refer their clients to the Service. As we might expect, the mediators enjoy working with these attorneys.

One of the lawyers' grievances against the Service seems to be that they feel they are being excluded and held away from their client while mediation is taking place and are not being informed of what is going on until the end of the process. Lawyers state that a memorandum of agreement drawn by the Mediation Service would be more positively received if they knew more about the process leading to its development. Mediators, on the other hand, fear that the lawyers' influence would interfere with their work, should they share what is going on in mediation with them. There is also the fact that mediation is confidential and should probably remain a separate process where parties can feel free to talk without having to worry about how the lawyers would later use any information should the mediation fail. At present, the extent of the interaction between the FMS and referring attorneys is mostly limited to the initial contact at the time of the first intake interview. This is held jointly with the clients and their attorneys. At the end of the mediation sessions, the mediator sends a short letter to the attorneys outlining the general outcome of the case.

Recently, when mediators and lawyers met for symposiums or conferences on mediation in Montreal, both groups expressed a desire for better understanding and better cooperation. And, in fact, there appears to have been a major change in the legal community's attitude towards mediation. It seems that lawyers are beginning to show an interest in the field and it is being stressed to them (by Judith Ryan) that they should familiarize themselves with it if they don't want to lose it to other professionals, social workers or notaries. As well, notaries in Montreal are showing a great deal of interest in mediation and many of them have joined the new provincial association of mediators.

The F.M.S.: A Proactive Service

In part this may be as a result of the emphasis the F.M.S. has put on reaching out to the Community and to the legal profession. For example, mediators take turns at presenting their services to different groups and community organizations. The Service also does a lot of publicity through the media and several articles have been written for different newspapers and magazines. A Montreal radio station ran a series of six open line talk shows where mediators of the Service talked about topics pertaining to divorce and mediation and the coordinator of the Service has made a few appearances on television.

In November of 1985, the F.M.S. in collaboration with other social, educational and governmental (provincial and federal) services, hosted a provincial Symposium on mediation. This event brought together about 100 participants (mental health practitioners, lawyers and judges) from all over the province to discuss and learn about mediation. The first day of the Symposium was designed to discuss issues related to mediation services in Quebec; the next two days were a training session for a selected number of participants led by Dr. Donald Saposnek, an American psychologist and exponent of divorce mediation, particularly in the area of child custody.

The F.M.S. also cooperated very actively in the formation of the Quebec Association of mediation which was officially implemented in the Fall of 1985, and, in the Spring of 1986, the coordinator of the Service along with representatives from the Montreal Bar and other legal services attended a special conference on mediation services in Australia. As well members of the Service have gone to other cities in Quebec to share their experience and promote mediation. The F.M.S. has always participated in national and international conferences on mediation and, the lawyer of the F.M.S. has promoted the idea of mediation amongst the legal community in Montreal. He and another member of the service have participated in teaching mediation within a course given at the Universite de Montreal. Finally, near the end of the present project, the F.M.S. became

involved in a pilot project to train lawyers and mediators in divorce mediation.

In short, our overall impression is of a highly committed group of professionals, convinced that they offer a valuable service, one which should be available to a wider number of separating and divorcing couples than is now occurring. We turn next to consider a different kind of court-based service in a court operating with a vastly smaller scale of operation than that just described.

The Saskatoon Court

History and Philosophy

Saskatoon's Unified Family Court is in its eight year of operation. It was officially opened in December 11, 1978 and is presently located on the tenth floor of a local downtown office building. Originally, the court was housed in what has now been designated a local heritage site, but after two years of operation, it was realized that the building was too small to accommodate the expanding legal and counselling/mediation demands that were being placed on it. Unlike the former UFC building in St. John's Newfoundland, which was housed in one of the city's heritage buildings, Saskatoon's court is virtually hidden away on the top floor of a modern office complex that contains, in addition to the court, city prosecutors, private lawyers, accounting firms and other professional groups.

The UFC consists of a legal arm, administered by the provincial Department of Justice, and a social arm which reports to the provincial Department of Social Service. The rationale behind having "separate" jurisdictions for the court's legal and social services stemmed from the view that the social arm should not be <u>seen</u> as distinct from rather than as an adjunct to, or appendage of, the legal arm of the Court. For the most part, the social and legal arms do operate as autonomous units. For example, the counsellor/mediator's offices are located in one part of the UFC and the judges chambers are located in another part of the court. Court files are kept separate from mediation/counselling files and both the legal and social arms have their own personnel.

In contrast, however, Saskatchewan's UFC was also envisioned as a consolidation of social and legal services, designed to deal with the family as a unit--to address both the legal and emotional problems associated with separation and divorce. As Havemann noted in his "evaluation" of Saskatchewan's UFC, the court was to be viewed as an "interdisciplinary team approach to family law. Our observations suggest that there is, however, little teamwork between the social and legal arms of the court but that there is definitely a strong teamwork approach among the

counsellors/mediators. This is evidenced, for example, by regular weekly meetings to discuss any of the previous week's activities, upcoming events, problems, counselling approaches, strategies and so on. Every Thursday morning the counselling staff hold a regular weekly meeting, and there seems to be a great deal of informal and ongoing collaboration.

However, there appears to be limited contact between judges and mediators/counsellors, and no teamwork approach among the judges, court administrator and registrars. These individuals occasionally consult with one another but our impression is that they basically perform their tasks independently of one another. Similarly, private and legal aid lawyers have limited knowledge about, and contact with, the social arm of the court and only a small percentage of lawyers in Saskatoon encourage their clients to explore mediation as a possible option for resolving custody and access issues.

Despite the original notion of "separate but equal," the social arm has specific responsibilities to the legal arm of the court, and the judges are the final arbitrators in deciding custody/access arrangements. Mediators can:

1. be ordered to undertake custody and access investigations for the court and to complete detailed reports for the judges;

2. be ordered to testify in court, be cross examined by lawyers, and be required to clarify, explain, and at times justify, the findings and recommendations made in their reports. (In addition, these recommendations can be ignored by the judges and it is not uncommon for judges to make rulings that are at least somewhat different from the recommendations made in the custody/access reports.)

And, while judges have the power to order "couples" to explore the option of mediation, they also have the power to overturn decisions reached through mediation.

Although there is respect shown between the judges and court workers as evidenced, for example, by the type and manner of questioning that judges permit in the courtroom when mediators are asked to testify at a hearing, the fact remains that judges have the power to order mediators to become involved in the court process, and there has been no formal or consistently used criteria developed to determine when and to what extent mediators will be brought into the legal process. Specifically, there is:

- no systematic criteria developed and used to determine when a custody investigation should, or will, be ordered;

- no standard criteria established to determine how a custody or access report will be used, or when, and on what basis, a mediators recommendations will be overturned;

- no criteria established to determine when, if at all, judges should refer cases to counselling/mediation.

The philosophy of Saskatoon's UFC is contained in the following operational objectives:

1. To provide practical and humane help to those whose families are in the process of breaking down or have broken down.

2. To recognize the importance of the family and to enforce the duties and rights of its members to each other and to society, whether they live together or not.

3. To ensure that the rights, needs, and feelings of children are properly recognized and protected in the resolution of family problems.

4. To provide a court with jurisdiction over all family matters which understands a range of problems beyond legal issues and which can deal with the family as a unit through a combination of court and social services.

5. To develop a court where the legal, social work, and other professions and groups work together in the resolution of family problems.

6. To inform the public and professional groups of the purposes of the Unified Family Court and the services that it provides.

7. To provide ready access to confidential counselling to family members who need help in resolving their problems before legal proceedings, during legal proceedings and during the period of adjustment which follows legal proceedings.

8. To save time, effort, and money for the clients and the courts by consolidating legal issues and avoiding necessary trials.

9. To balance the need for public court proceedings and records against the need for privacy and confidentiality in dealing humanely and effectively with sensitive family matters.

10. To develop an effective means to enforce maintenance and other court orders to the extent that the resources of the project permit.

The Physical Setting and Organization

Saskatoon's UFC has three courtrooms and, with the exception of pre-trial hearings and Family Services cases, hearings and trials are open to the general public. Courtroom 1 is used for first returns, chambers and divorces (the granting of decree nisis), and courtrooms 2 and 3 are used for Family Services cases and trials. There is a "long", narrow corridor outside the courtrooms that is used as a waiting room for people attending hearings and trials and clients with counselling/mediation appointments. The corridor is often crowded and cramped-- particularly Monday mornings and afternoons. There are three small interview rooms situated across from the court rooms. They are not sound proof and offer little privacy to lawyers and clients. Also, adjacent to the corridor is a children's playroom. Although it is filled with toys for different-aged children it gets relatively little use and it is basically an unsupervised environment for those children that do make use of it.

One of the major problems with the court schedule in general, and the structure of the court in particular, is that it has great difficulty accommodating the increased demand for hearings and trials. It is our understanding that lawyers and their clients must wait up to six months for an available trial date. Often this backlog makes it difficult for even the uncontested separations and divorces to be resolved in a relatively short period of time. Time delays and backlogs pose additional problems to lawyers and clients-- in contested custody cases, the longer the non-custody parent has to wait for a trial date the less likely he or she is to be given custody and in cases where a custodial parent is requesting the ex-spouse to pay maintenance for the children, time delays can have serious economic consequences for the children.

Dockets are usually compiled every afternoon for the next day's court session. Although the court registrars claim that the dockets cannot be compiled days in advance (because lawyers have the option of adjourning their cases at the last minute and there is the uncertainty of not knowing how long a case will take to hear in court), the system that is presently in use contributes to the overcrowded conditions in the court. For

example, in the case of chambers and first returns, there may be 15 to 20 clients and lawyers in the courtroom at any one time, and it is usually not known, in advance, what the order of these cases will be. Consequently, clients and lawyers may have to wait in the courtroom, or the corridors, sometimes for half an hour to an hour, until their case is called. (For clients with private lawyers, this waiting process can be costly.)

The Unified Family Court, as well as serving the population of Saskatoon, serves communities within approximately 100 miles of the city. On occasion services such as custody investigations have been provided, upon request, to clients and courts outside the jurisdiction of the UFC. To receive UFC services, both spouses do not have to reside in Saskatoon, or the surrounding areas. As long as one of the parties lives within the jurisdiction of the UFC both are technically eligible for services provided by either the social or legal arm of the court. (Approximately one-third of our sample involved cases where only one party resided within the jurisdiction of the court.)

Legal Arm

There are three UFC judges in Saskatoon, two men and one woman, and each has been with the court since its inception in 1978. Our observations over the time of the project suggest that each of the three UFC judges has her/her own style and approach and, apparently, areas of expertise. Indeed, some lawyers we interviewed, indicated that they prefer to have specific cases heard before a particular judge. For example, one of the judges is reputed to have an expertise in tax law and if a lawyer is handling a complicated matrimonial property case he or she may very well try to get that case scheduled on a day when that particular judge is presiding. As well, one of the judges is known for taking a "hard line" position that court costs should be borne by the parties. Thus, even in Needy Person's Certificate cases, where the applicant is represented by Legal Aid and the state has agreed to absorb the costs of the separation/divorce, this judge maintains that if the respondent is able to pay the necessary court costs he or she should and will be ordered to do so.

Our observations suggest that there is, at times, inconsistencies among the judges, regarding the amount of maintenance non-custodial parents are ordered to pay, perceptions also held by a number of clients interviewed in the Client Study. For example, it was not uncommon to witness and to hear of cases where two non-custodial parents, with apparently, similar incomes and the same number of children, were ordered to pay different amounts of maintenance.

Indeed, on the basis of observations in court and examination of the court files, themselves, it was not clear exactly how maintenance quanta are determined. However, particularly before the Divorce Act, 1985, there seemed to be a mixture of factors which judges were taking into account including, ability of the non-custodial parent to pay; the needs of the children; the economic position of the custodial parent; and what had been negotiated by the spouses and/or their lawyers.

While there appears to be some inconsistency in awarding of maintenance orders, our impression is that, despite the changing attitudes about alternative family forms and parenting, there is consistency in custody and access awards. On the whole, the prevailing view is that it is in the best interests of the child for the divorcing or separating parents to reach a mediated or negotiated custody and access settlement. Where this does not occur, and unless there is strong evidence and extenuating circumstances, the presumption of maternal preference prevails; that is, our observations suggest that women rarely have to show just cause why it is in the best interests of the child that she be awarded custody. In contrast, men must make a case as to why they are the better or an equal parent.

Nor has the Saskatoon Court shown much enthusiasm for joint custody. For example, in a televised interview one of the UFC judges noted that joint custody was not a healthy alternative for most families because most parents are not able to work together to provide a healthy and stable emotional and social environment for their children--because one parent lives in another city or province, or because of the circumstances that led to the separation/divorce.

In the view of this judge, children need consistency in their up-bringing--their own space, a familiar neighborhood and their own friends--and this can only be provided in a predictable physical and social setting. Children need continuity and consistency and this judge maintains that with few exceptions, joint custody arrangements are unable to provide stability and continuity for the children. Thus, unless the parents have negotiated and reached a joint custody agreement and can demonstrate their commitment to make such an agreement work, this judge will not consider and sanction a joint custody arrangement.

At the same time, though, the operating premise is that parents will make decisions about custody and access that are in the best interests of their children and that both parents are "capable" parents. It is assumed that the non-custody parent should maintain regular, ongoing contact and involvement with the children unless reasonable grounds can be shown to the contrary. This is evidenced by a number of practices at the court:

- with few exceptions, the court is much more likely to order reasonable or liberal access for the non-custody parent than specified access. Rarely is access denied to the non-custody parent.
- if a custody and/or access agreement is reached by the parties, it is rare that the court will overturn or change them.

- it is rare that children will be permitted to testify at a hearing or trial. It is assumed that children should be shielded, as much as possible, from the legal and emotional conflict between the parents.

Our observations of court proceedings suggest that they are primarily non-adversarial. Judges are careful not to allow mud-slinging in their courtrooms: as "moral umpires" of the courtroom, they try to keep things at a level of civility and seem highly sensitive to the fact that separation and divorce are often emotionally traumatic experiences that should not be exacerbated by the courts. Too, we found considerable evidence that the prevailing attitude which emerges from judges verbal and written judgments is a no-fault orientation. They are, in other words, reluctant to place blame on either of the parties. Rather, they generally base their decisions on "best interests of the child" principles and, while preferring sole custody encourage the non-custodial parent to remain actively involved in parenting.

Finally, our impression is that, as judges in the UFC come more and more to rely on custody assessments in contested cases, fewer lawyers feel it of much use to employ adversarial approaches within the court hearing. Instead, as many told us, they rely more on negotiation; where there seems a low likelihood of gaining custody for their client, they attempt to work out more liberal access arrangements.

At the same time, as our interviews with clients and observations outside of the courtroom sometimes showed, the rather benign court hearing is the tail-end of a confrontational and punitive process. For example, as some clients told us, negotiations between lawyers were, at times, acrimonious and led to an attenuation of the level of conflict and seemed to have little to do with working out a settlement which would be best for the children.

The Social Arm

Since approximately February of this year, the makeup of the counselling/mediation staff has changed significantly. When we began this study most of the counselling staff had been with the UFC since its inception in 1979. During the course of our research, however, one of the counsellors accepted a new job with

a family counselling agency in Saskatoon and last spring one of the counsellors, who had taken a one year leave of absence to teach at the post secondary level, returned to the UFC to assume his duties. In addition, the former co-ordinator of the mediation/counselling services at the court, accepted a new administrative position with Social Services. Consequently, our analysis of the social arm of the court is based primarily on information obtained either prior to February 1986 or from staff who have been with the UFC since the beginning of this study.

In addition to the Co-ordinator's position (which entails approximately 50 percent counselling/mediation and 50 percent administration) the UFC employs three full time counsellors. Also, a contract position was obtained last year and a counsellor was hired on an eight month appointment--this person is still employed as a counsellor with the UFC and her contract is extended on a month to month basis. The counselling staff also accept two practicum students each year (one each academic term) from the School of Social Work and last year some of the Department's surplus funds were used to hire six casual staff to assist with custody investigations.

Three of the four counsellors have M.S.W. degrees and the fourth has a B.S.W. Three of the four came to the Unified Family Court with prior experience in child protection. At the time of our research, two of the counsellors had been with the UFC since 1978 and one since about 1982. With the exception of one of the recent appointments who worked under Howard Iriving as a graduate student, none of the staff came out of a direct counselling or mediation experience.

Anyone who contacts the UFC requesting separation counselling or mediation will receive an appointment within two weeks. In 1985 between 11 and 26 new files were opened each month by the UFC counsellors. The eligibility guidelines for UFC counselling/mediation services are flexible and discretionary. The official policy states two criteria for eligibility:

1. Any "couple" going through a separation or divorce.

2. Any "couple" within a 90 mile radius of Saskatoon.

In reality however there are many open files that do not meet this criteria. For example, individual ("one to one") separation counselling is done at the UFC (and this is supported by a number of people we interviewed). As well, the counsellors will work with the children of separated or divorced parents.

The intake worker's job is rotated between the counsellors on a weekly basis. When a person contacts the office for an appointment an intake form may be completed at that point. Otherwise it is filled out after the person or couple's first

visit with the intake worker. The intake form itself is a one page information sheet on the party or parties. It provides some standard information on the parents and their children, data concerning source of referral, presenting problem(s) and type of file to be opened. After the intake form is completed the party or parties are assigned to a counsellor/mediator.

Each counsellor/mediator has his or her own style of compiling files with the result that some counsellors/mediators are much more detailed than others in their observations and record keeping. Files are supposed to be made inactive within 90 days of being opened but, for at least two reasons, this often does not happen. First, due to heavy caseloads the counsellors/mediators often find it difficult to review their open files on a regular basis and decide whether or not to make them inactive. Second, a significant number of clients use the counselling/mediation services on an ongoing basis--ie. they may attend one or two sessions initially and then contact the court two or three months later for additional sessions. The counsellors told us that many of their files are opened and closed on a regular basis and it is common for inactive files to be reopened a year or more after a couple has received initial services through the social arm.

Aside form intake, the staff provide four major services:

1. counselling
2. mediation
3. custody/access reports (C.O.'s)
4. public education

It is a policy of the court, that staff provide only one type of service per client or couple. For example, in a case where a "couple" attends counselling sessions initially and later become involved in mediation, two staff people would be involved in the case, one doing counselling and one doing mediation. In the event that a custody/access report is ordered, a third staff member would become involved. In setting up the services this way counselling and mediation issues are kept separate and privileged information that is brought out in a counselling session can remain confidential. In contrast, any information released during a mediation session or a C.O. interview is not confidential and can be used in a court of law.

Due to the relatively small number of counsellors/mediators at the court, balancing and distributing the workload can be problematic. For example if one or more counsellors knows a client personally or if a staff person is absent for an extended period of time it becomes difficult to deal with cases that require counselling, mediation and a custody/access report.

Philosophies and Methods

Our observations and discussions suggest that the counsellors/mediators maintain a similar set of assumptions about parenting. Specifically, it is assumed that:

1. Parents are rational and will make decisions that are in the best interests of their children.

2. It is the parents' role to make decisions with respect to custody and access, for their children and that the children should, and will, abide by the decisions reached by the parents. In other words, it is strongly held that children should not be directly involved in the actual decision making process.

3. Both parents should be actively involved with their children and that the best type of access arrangement is one where there is both regularity and flexibility in the visitations.

While there is obvious overlap, the counsellors make what is, at least, an analytical distinction between counselling and mediation. In general, when a client approaches the court, for information on maintenance and custody, he or she is invited to bring the other spouse in for consultation and, possibly, mediation of the basic issues of custody and access. In other words, while in some services the counsellor writes or phones the other spouse explaining the service and suggesting an appointment, the Saskatoon policy is essentially reactive rather than proactive; in the coordinator's view, if people can't communicate sufficiently to discuss a joint meeting, there is little point in attempting mediation. If couples do approach the court, the general sequence is for the coordinator, in a preliminary interview, to assess the needs and wishes of the couple. If, in her view, what is being sought is marriage counselling--ie. reconciliation, the couple will be referred to a public or private agency outside of the court. This is because, as a matter of policy, the UFC does not offer reconciliation as a primary service.

The outcome of the first session can, then, take three forms: a) the couple are assessed as in need of reconciliation counselling and are referred out; b) the couple are unsure of what they want and are, therefore, scheduled for separation counselling; c) the couple are committed to ending their marriage and are scheduled for mediation. Separation counselling can, however, have two basic outcomes: the couple conclude that they wish to work to save the marriage or they wish to end the marriage. If the latter, they proceed on to mediation; if the former, counsellors do offer a limited amount of what is, essentially, reconciliation counselling.

As noted above, all but one of the staff had worked in child protection. It seems that experience in this emotionally traumatic area of social work has given them both a depth and breadth of understanding of families in crisis -- in particular, interpersonal dynamics, reactions to conflict, coping and healing -- and a range of perceptual and counselling skills that they are able to adapt to different types of situations and circumstances.

Every counsellor/mediator has developed, and is able to use, a wide range of counselling skills and models. Each counsellor/mediator has his/her style of using these skills and approaches. For example, one counsellor frequently requires his clients to do weekly assignments or exercises that get them focussed on different aspects of their separation or divorce and prepared to discuss these issues at subsequent sessions. From our observations and discussions, none of the counsellors seem to be locked into a singular or monolithic counselling model -- although there are certain standard practices that are used and certain models may be preferred over others. For example, one mediator leans toward the Saposnek Model which is task-goal oriented and based on a linear method of problem solving--moving from relatively easy problems to solve to increasingly more difficult problems to resolve.[65]

Also, the mediators prefer to meet with a husband and wife separately before scheduling a joint mediation session. These individual sessions serve a number of purposes:

1. Role clarification:

> Mediators have to establish their neutrality as a facilitator -- to make it clear that they are not an advocate for one of the parties. One mediator told us that in an individual session if there is any indication from the client that he/she thinks the mediator will side with the other spouse, he will confront the client on this and will not proceed with a joint session until this problem is resolved.

2. Identifying and clarifying issues:

> Counsellors/mediators want to know what type of emotional baggage each client might bring into the joint sessions and to either mitigate this possibility (ie. through individual counselling sessions) or to prepare for it. They also want to get a clear picture of their clients personalities, lifestyles, views on parenting etc. and to find out what their "bottom lines" are with respect to custody and access

---

65 D.T. Saposnek, Mediating Child Custody Disputes, San Francisco: Jossey-Bass, 1983.

-- in other words what the parties are and are not prepared to compromise on.

3. Trying to equalize the balance of power between the parties:

   If the mediator senses that one party is more dominant/overpowering than the other he/she will try to work with the "submissive" spouse and help him/her develop better communication and assertiveness skills and/or build self confidence etc. How extensive and effective this process can be in the short period of time the mediator is able to work with an individual is viewed as a problem by all of the staff.

4. Discussing procedural matters with the parties and, in particular, how the mediation process will work.

5. Determining whether the parties are actually ready for separation counselling or mediation.

Our observations suggest that much of the decision making process with respect to "readiness" seems to be based on the counsellor/mediator's subjective assessment of the situation and the parties. However, this assessment process is based on the many years of experience that each social worker has had dealing, on a day to day basis, with separated and divorced couples. Aside from this, there does not seem to be any standardized criteria that the mediators use to determine whether or not mediation is an appropriate alternative for a particular case.

The counsellors maintain a similar set of criteria for determining the appropriateness of counselling for a particular case. They all look for certain indicators to guide their judgments and for a consistent set of messages being communicated by the parties. For example counsellors use as indicators of the possibility of reconciliation:

-living together
-contact--ie. regular telephone conversations, meetings for lunch, "dating"
-both parties are isolated from others
-sexual relations
-willing to see a marriage counsellor
-mixed feeling about being separated

Indicators of permanent separation include:

-living apart
-legal separation
-little or no physical contact--ie. have not seen each other in months

-no sexual contact
-parties are developing new social networks
-have gone to a marriage counsellor

Mediators try to get a clear understanding of what are the parties' committment to the marriage -- caring, respect, plans etc. and then to look at the reasons for the separation. If the parties have ambivalent feeling about the separation and/or there is an indication that the marriage might be reconciled, the counsellors will encourage the parties to see a marriage counsellor.

The mediators have told us that individual client sessions are critical to the outcome and effectiveness of the joint sessions. If successful, they make the clients more knowledgeable, comfortable and confident about the process and it gives the mediator important pieces of information about each party and their situation. This in turn will affect how the facilitating role is played--ie. what questions to direct the parties to, how to diffuse potentially destructive behaviour, how to keep both parties participating in the process and moving toward an agreement.

Although mediation is not regarded as counselling, the mediators at the Saskatoon court told us that they use their counselling skills during the mediation sessions to facilitate the process -- ie. to clarify issues and decisions, promote a healthy dialogue between the parties, prevent or mitigate the potentially negative effects of emotional reactions, such as anger and frustration, by one or both parties.

As well, it is our impression that the mediators play a controlling role in the mediation process. Although they are not advocates for one party and are not playing the rescuer role, mediators nonetheless have a direct impact on the direction and outcome of the mediation. They do this:

- by raising and directing the parties to deal with specific issues and questions;

- by using body language and other forms of non-verbal communication (ie. moving their chair forward or back) to affect the climate of the discussion, to keep the parties focussed on a particular issue, to diffuse tension and to keep the parties talking and moving towards an agreement;

- by intervening if one party is dominating the session, if the conversation is getting off track or if one or both parties are personalizing issues and/or showing disrespect to others.

Interestingly, although the role of mediators is, in one respect, a regulatory one they do not view this in the context of potentially taking control away from the parents, restricting the options of the parties or biasing the process and outcomes with their personal/subjective views and techniques. Rather, they maintain that their role is primarily to facilitate and direct the mediation process--the actual decisions (outcomes) are said to be made solely by the parents and, with rare exceptions the mediators will abide by those decisions even if they do not personally agree with them.

Custody and Access Investigations

Counselling staff have on many occasions indicated that the greatest satisfaction in their work is doing counselling and mediation. In contrast, they say that the most stressful and least liked aspect of their work is doing custody and access investigations. There are a number of reasons why the social workers do not enjoy the investigative work:

- It forces them into a quasi-judicial role--ie.investigating cases for the court and making recommendations to the judges;

- It is a time consuming and energy intensive task. On average, it takes approximately 2 months (or 40 hours) tocomplete a report;

- The investigators are subject to cross examination in court and this adds to the stress of doing reports. In addition the recommendations that the investigators make in their reports may not be accepted by the judges and this may contribute to the physical and emotional stress of the worker;

- They feel that their time would be better spent doing more counselling, mediation and education. As it is, the morereports each counsellor has to do, the less time he or sheis able to spend with clients.

Between January 1985 and December 1985, 90 custody investigations were ordered. (This compares with 80 that were completed in 1984). Although this increase may not appear significant, it must be understood within the context of available people to undertake and complete the investigations, waiting periods and delays. During the summer of 1985 each counsellor had been assigned a maximum caseload of four investigations at any given time. This number was raised to six in September 1985, reduced to 5 in January 1986 and then back to four in the spring.

Custody and access reports are written as family assessments. They involve extensive one to one contact with parents (individually and together), children (alone and with parents), new spouses, other family members and people referred to and/or listed by each parent -- ie. employers, neighbors etc.

Custody and access reports are so frequently requested by the judges because it gives them a perspective to work from and it reduces congestion in the court. That is, in approximately two-thirds of all contested cases where a report is completed, the parties will abide by the recommendations made by the investigator.

At the same time it also appears that the judges may not support or follow through with the recommendations made by the investigators.

Counsellors suggest at least four possible reasons for this:

- after a 2 or 3 day trial judges may feel that they know as much about the parents and their children as the investigator does;

- the information presented in court is considered accurate and complete because the testimony is given under oath;

- judges are exercising their powers of discretion;

- investigative reports may not be up to date if there have been lengthy adjournments to a case following the completion of a report.

As in most family courts, our sense was that there were not enough resources available to do both custody investigations and handle the counselling and mediation caseload in the way most counsellors would prefer. At that time, counsellors were carrying a caseload of between 25-35 clients and working on at least four custody investigations. The consensus was that if the demand for custody and access reports was to increase, there would, inevitably, have to be a decrease in the amount of counselling and mediation done in the court.

At the time of our research there was a seven month waiting period for custody investigations, a matter of concern for many lawyers and their clients. The waiting contributes to the unsettled nature of the separation or divorce, delays custody and access settlements from being reached and places the non-custody parent at a serious disadvantage in that the longer the custody parent can maintain interim custody of his/her children the less chance there is of the non-custody parent getting permanent custody.

One solution would be to contract out this aspect of their work. However, for three reasons, this occurs very rarely. First, there is, at present, insufficient funding available through either the Department of Social Services or the Department of Justice. And, second, even if funding were available, the staff are not sure they could find, in Saskatoon, social workers with the requisite experience in child protection work. Finally, there is concern about how to ensure the quality, depth and accuracy of reports done by outsiders.

Public Education

Although the educational work of counsellors/mediators is not profiled as highly as their counselling or mediation work, the social workers at this court do a significant amount of public education and staff development. The educational work is a team approach where staff formulate ideas, create strategies, distribute tasks and share teaching responsibilities. One area that the counselling staff has been actively involved in is a series of seminars on separation and divorce that are offered throughout the year at the UFC.

The counselling staff has developed four workshops designed to inform and assist recently separated people. These workshops are run approximately three times per year (between October and June) and each series of seminars is facilitated by one of the counsellors. The seminars attract, on average, between 20 and 35 participants--most of whom are women.

Talks, presentations, films and panel discussions are focused on the following topics:

Seminar #1: "You and the UFC"

> At this session a lawyer is brought in to talk about the UFC, the legal rights of the parties and the responsibilities of the lawyer to his/her client. This seminar usually draws the largest crowd--possibly because a lot of recently separated people are looking for basic legal information to guide their decisions.

Seminar #2: "Coping Alone"

> This session is geared to both the emotional, social and parenting concerns of people who are recently separated or divorced.

Seminar #3: "Children and Separation"

> This seminar looks at the social and emotional changes and problems that often affect the children of separated or divorced parents. It identifies specific problems and possible strategies for addressing them.

Seminar #4: "Parenting after Separation"

> This seminar was newly established last fall and addresses the issue of parenting after parents have worked through the initial emotions of their separation and are concerned with family adjustment, access issues, coping as a single parent and future planning.

These seminars draw upon a range of community resources including lawyers, private counsellors and people who have gone through a separation and/or divorce. In addition to the seminars, the counselling staff has been actively involved in developing and facilitating day-long workshops, in different parts of the province, for professional groups (i.e. other social workers and lawyers), that are interested in learning about and/or doing mediation. One of these workshops was held in Saskatoon last May and its primary purpose was stated as follows:

> "This workshop has been organized to provide social workers, lawyers, and other professionals with an opportunity to find out what is happening in the growing field of family mediation in Saskatchewan. This is your chance to gain a beginning appreciation of mediation practice issues and to become familiar with the philosophy and principles of mediation. You will have the opportunity to discuss issues of concern with practicing mediators."

The counselling staff at the court take their educational role seriously and considerable time and effort goes into developing and organizing educational forums that are geared to increasing both the public and professional's knowledge of mediation. Each of the consellors/mediators is involved in Family Mediation Saskatchewan and Family Mediation Canada. Their work is a clear indication of their commitment to the concept/practice of mediation as a healthy, practical, non-adversarial approach to conflict resolution.

The St. John's Unified Family Court

As in Saskatoon, the St. John's court was initially one of four Unified Family Court demonstration projects. It began operation in June, 1979 and has continued to operate after the three-year demonstration period. Passage, in 1977 of the Unified Family Court Act gave the court jurisdiction over the City of St. John's and the surrounding area within an approximate 40

kilometre radius of the City centre. Thus, given the concentration of Newfoundland's population in this part of the Avalon Peninsula, the UFC deals with a major portion of the divorce and separation cases in the province.

At the time our research began, the court was located in a historical property in old St. John's. This building was equipped with separate waiting rooms and play areas and, in general, was designed to create an informal atmosphere both in the reception areas and in the court itself. For example, the one courtroom was located in what was probably the dining room and, in place of the raised platform of most courts, used a simple table for the judge. An impressive curving staircase led to the offices of the court administrator, the court workers and the maintenance service of the court. There were also separate waiting rooms for the two spouses; unlike most Canadian courts, it was not necessary to sit cheek by jowl with one's spouse before entering court.

We put all of this in the past tense because, in the summer of 1986, the building was completely destroyed along with a sizeable proportion of court records. Thus, during our final visits to the court, we found it housed in the lower floor of the main courthouse in St. John's. It is of some note that the fire occurred on a Saturday evening but, by Monday or Tuesday, the UFC was back in operation, albeit in some degree of disarray.

By the time of this catastrophe, our analysis of the court files had been completed so that the main outcome of the fire is that it was not possible to determine very systematically how many cases had returned to the court for variation on enforcement of orders. But, for other kinds of reasons, our observational data on the St. John's Court is extremely limited.

Some four or five months into the project, the researcher assigned to this research site became ill and was unable to continue work on the project. While we were able to replace her with another individual, by the time she was in a position to observe the counselling and mediation service, all of that staff, for various reasons, resigned from the Unified Family Court. Replacements were made for these individuals but none were made permanent positions until the spring of 1986. By then, our schedule required that we be out of the court and interviewing clients. In any event, it did not seem feasible, or fair, to attempt to observe what was, in effect, a brand new service. Finally, while it did not have a direct impact on the research, it should be noted that the court administrator, who had been with the UFC from its beginning also resigned to take another position in Central Canada. And, as well, the one judge in the court moved over to another part of the Newfoundland Supreme Court. She was replaced by Madame Justice Mary Noonan who, as previously, a member of the provincial department of Justice, had

been instrumental in getting the Unified Family Court into St. John's.

This particular judge, then, has a high degree of commitment to the philosophy underlying the Unified Family court model and, in particular, the use of non-adversarial approaches to resolution of marital and familial disputes. For example, as was the case with the former judge, she invariably orders a custody assessment in contested custody cases and, in general, has encouraged disputing parties to avail themselves of the social arm of the court.

The Social Arm

At the time of our research, the social arm consisted of two full-time counsellors and a half-time person. As well, the Court makes extensive use of outside professionals, mainly for custody assessments. The social arm was expected to provide services in the areas of intake, information, short-term counselling, mediation and custody investigations. As we learned, while all of the staff had an interest in divorce mediation, intake work, information giving, personal counselling and conduct and/or supervision of custody investigations occupied most of the time of this small staff.

Indeed, at that time, most of the divorce mediation was being done by one of the counsellors. He had, previously, been involved in the Court in a special project on crisis counselling, cases where there is physical violence and abuse. He has been particularly active in setting up a Newfoundland branch of Family Mediation Canada and has considerable knowledge of the field. At the same time, understandably, not all of his time was devoted to mediation and it was apparent that in at least some of the cases, the line between counselling and actual mediation was more difficult to draw than in the other two research sites. In short, the number of cases we were able to include in our analysis was limited to 60 and, in some of these, we remain doubtful that there was full-fledged mediation of the kind we were able to observe in the other two sites.

We should note, however, that while only custody and access are dealt with in the St. John's Court, the court administrator, as well as some others on the court staff, do, as a justices of the peace, attempt, through informal hearings to mediate an agreement on maintenance quantum and, thus, avoid a formal court hearing. This approach, however, is only available to what, in the UFC are called "family cases", those proceeding under provincial legislation rather than the Divorce Act.

While there is, in St. John's, growing interest in divorce mediation including involvement in the new association of lawyers, it appears that most of the private mediation is done by

two or three individuals. Each has other full-time work and, from time to time, takes on custody assessments under contract with the Newfoundland Department of Justice.

In sum, while we have the objective data from the court records and the client interviews, we lack the kind of descriptive and qualitative data just presented for the other two research sites. We turn in the next section, to consider divorce mediation in Canada more generally.

DIVORCE MEDIATION IN CANADA

At the time this project was first prepared, it was noted that, in Canada, court-based counselling and mediation offered a wide variety of services, ranging from simply intake and information to longer-term therapeutic counselling. As well, some services offered only mediation or conciliation of custody and access while others dealt with all four of the basic ancillary issues. And, it seemed, at the time, that there were a number of approaches in use by those offering mediation. We concluded that there remains considerable debate about the nature, the scope, the approach and the goals of divorce and family mediation.

Two years of research on mediation and its outcomes and attendance at a variety of conferences focusing on divorce mediation have done little to change or revise those initial impressions. While the past few years have seen the concept of divorce mediation eclipse earlier notions of reconciliation and conciliation counselling, our observations at conferences and our interview data suggest that, in Canada, this is still a new and developing field with unresolved debates about approach, about scope and about the appropriate qualifications to become a divorce mediator. Indeed, the discussions and presentations at the various conferences we have attended suggest that this is an occupational group which is nearly a text-book case of what sociologists have codified as the "process of professionalization".

Professionalization

One of the first steps in that process, formation of an organization, has already occurred at both the National and Provincial levels. Second, these newly formed associations have recently developed codes of ethics "governing relations of family mediators with their clients, their professional colleagues and the general public".[66] Such codes have gone some way toward defining divorce mediation and its place in the legal system.

---

66 From the Forward to "Code of Ethics", Ontario Association for Family Mediation, Code of Professional Conduct".

But, what particularly distinguishes a profession from an occupation is its ability to determine entry requirements and qualifications. However, a matter of continuing debate and controversy is the question of whether, at this point, to attempt to specify the qualifications and experience required to identify oneself as a divorce and family mediator. On the one hand is the understandable concern that, at present, virtually anyone can proclaim themselves a divorce mediator. On the other hand, the prevailing consensus seems to be that, in this relatively new field, it is premature even to try to set out minimal qualifications for mediators.

There appear to be at least two reasons for this reluctance to set out explicit qualifications. First, at this point, it is apparent that most of those who offer or are interested in divorce mediation have come to it by a variety of routes and as much by accident as design. What specific training they do have in mediation has come from attendance at workshops presented by individuals who have written what Kressel calls "enthusiastic 'how to' manuals addressed to the prospective or novice divorce mediator". While, as will be described below, the majority of these individuals have professional training in mental health fields, few of those who refer to themselves as mediators have formal training in this field.

What we believe to be a second reason for the reluctance to specify qualifications is that divorce mediation, developed essentially in the United States, has emerged out of two quite distinct fields with equally distinct orientations. The dominant orientation has, of course, been conciliation counselling. By and large, those who, as mediators, have emerged out of this tradition were trained in one of the mental health professions and bring to this field an implicit if not explicit orientation towards counselling and therapeutic-based approaches. But, as lawyers have become interested in mediation, they have been drawn towards the much more structured and goal-oriented approach of what has come to be called "alternative dispute resolution" techniques. It appears that this branch of divorce mediation draws upon the same body of theory and strategy as is used in mediation of labour and other disputes. The "touchy, feely" world of social workers is eschewed in favour of approaches which, in effect, set the emotions aside, and which deal with the basic issues: who gets the children; how will the property be divided; who pays whom and how much and for how long.

Implicit in the preceding discussion is that divorce mediation has, it were, emerged like a phoenix out of the ashes of the more traditional field of conciliation counselling. To some extent we believe this to be the case; many who a few years ago defined themselves as conciliation counsellors now think of themselves as divorce mediators. Yet, as the descriptions of the three services included in this study, indicate, while all have

drawn upon and been influenced by recent literature on divorce mediation, none have entirely departed from the earlier notion of reconciliation and conciliation counselling.

It is perhaps worth speculating on the reasons for the change in terminology. There appear to be at least three reasons The first, and most obvious, is that the term, conciliation counselling, is simply too confusing; while it is, conceptually, quite possible to think of a continuum between reconciliation -- keeping the marriage together -- and conciliation counselling -- reconciling the issues and ending the marriage -- it is evident that this is a difficult distinction for people outside of the field to make. For both potential clients and, for that matter, judges and lawyers, the term divorce mediation, does appear to convey better the goals of this approach.

A second and related reason for the change is that mediation, with its emphasis on a finite contract and a structured approach, resonates better with court administrators and the legal profession; mediation is understandable and familiar from other areas of dispute. It promises measurable results in a fixed amount of time. In contrast, counselling is often more open-ended, its goals sometimes vague and fuzzy and success often lies in the minds of the counsellor and the counselled. In short, in a system in which cases, except for the most vexatious minority, have beginnings and endings, it is much easier to "sell" mediation than conciliation counselling.

And, finally, as mentioned above, lawyers are, for the most part, not trained in counselling but do understand the concept of mediation. To the extent that lawyers are interested in the field, approaches and philosophies which downplay the emotional and therapeutic aspects of counselling are likely to be more attractive. It is, then, perhaps not surprising that in the United States, nearly half of those who call themselves mediators have been trained by James Coogler, who during his lifetime, espoused an approach in which there is a very explicit effort made to separate the substantive from the emotional problems of divorcing. [67]

Given that much of the divorce mediation literature and training has come from the United States, it is understandable that the same transition from conciliation counselling to divorce mediation would occur in Canada. However, Canadian lawyers have, to date, shown less interest in practicing mediation and the dominant influence on Canadian mediation -Howard Irving -- though moving to a more structured approach, has never abandoned his

---

67 J. Pearson, M. Ring and A. Milne, "A Portrait of Divorce Mediation Services in the Public and Private Sector", Conciliation Courts Review, 21, 1983, pp. 1-24.

social work orientation that one must deal with both the emotional and practical aspects of marriage breakdown.[68] In short, as the following paragraphs describe, divorce mediation in Canada is, at present, almost exclusively the domain of individuals trained in social work and the mental health fields.

Aspects of Divorce Mediation in Canada

As described in Part 2, the two supplementary studies were constructed so as to take us beyond what we have just described about the three court-based services in order to gain some perspective on the Canadian situation, generally. The following paragraphs draw upon our interviews and mail survey of family mediators and family law practitioners across Canada and the Inventory of Reconciliation and Conciliation Services in Canada, commissioned by the Department of Justice, Canada.

In both the United States and Canada, recent years have seen an impressive growth in the number of individuals involved in divorce mediation. The recent profile of divorce mediation and reconciliation services, for example, lists 476 individuals representing some 307 agencies, organizations, government services or private practices. The profile notes that 36 percent of those responding were in private practice, 28 percent were in non-profit community agencies, 26 percent were in unified family courts and 4 percent were in a range of agencies or settings. Table 4.1 shows the distribution for the 180 individuals who responded to the present mail survey.[69]

Table 4.1
Work Settings

Location	Percent
Court-based	35.5
Private Part-time	31.4
Private Full-time	7.7
Community Service	16.0
Other	9.5

1) Training and Qualifications

As is also observed in the profile, those responding to the survey have impressively high educational qualifications, with 71 percent of mediators and 81 percent of reconciliation counsellors holding a post-graduate degree. While fewer of those who

---

68 Howard Irving, Divorce Mediation: The Rational Alternative, Toronto: Personal Library Publishers, 1980.

69 The mail survey was sent to those included in the Inventory of Reconciliation and Conciliation Services in Canada.

responded to the present questionnaire (61 percent) hold a second or third degree, virtually all (93 percent) have at least a bachelor's degree, usually a Bachelor of Art (76 percent). The most common second degrees are psychology (38 percent) followed very closely by a Master of Social Work degree (37 percent). As in the main survey, about 10 percent of counsellors hold a Ph.D. degree, again most often in psychology (65 percent).

It appears, however, that few if any of these counsellors have had formal training in mediation. Rather, virtually all indicated that their training had come from on the job experience, from short-term workshops and from reading.[70] Thus, it is not surprising that less than one-fifth of the counsellors reported that they adhere to a particular mediation model or approach (Table 4.2). Rather, most have developed their own approach, at times, it seems, drawing upon and adapting existing models to fit their particular circumstances or personalities.

In short, the evidence available on the qualifications of divorce mediators suggests that while mediators are well educated, their training in mediation is limited and uneven. Assessments by lawyers provide some independent evidence about the qualifications of mediators in their communities. In general, these family law practitioners view divorce mediators as well qualified in mental health and counselling but as lacking the necessary qualifications to deal with the complexities of family law (Table 4.3).

Table 4.2
Mediation Approach

Approach	Percent
Specific model	18.9
Adaptation of existing model	24.4
No model or own approach	56.7

70 It is of some interest that while a number of names were mentioned in connection with specific courses or workshops, the name most frequently mentioned was that of Howard Irving.

Table 4.3
Lawyers' Assessments of Qualifications of Divorce Mediators

Assessment	Percent
Well qualified	12.5
Well qualified in counselling but not in family law	72.2
Poorly qualified	9.7
Don't know/other	5.6

Predictably, lawyers and divorce mediators have different views about the most appropriate training or background for divorce mediation. Nearly half of family law practitioners believe that mediation should only be done by those trained in law whereas divorce mediators would, it appears, open the field to both professional groups. Finally, an overwhelming majority of divorce mediators favour some form of state certification of practitioners either now (74.7 percent) or in the future (11.7 percent).

Table 4.4
Views on Most Appropriate Background for Divorce Mediators

Type of Background	Divorce Mediators	Family Law Practitioners
Only people trained in the mental health professions	20.0	38.7
Only people trained in the legal professions	1.8	49.7
Both groups of professionals	65.5	11.0
Other	12.7	0.6

Some sense of the newness of divorce mediation is that counsellors have, on average 9.9 years of counselling experience but only 5.3 years of mediation experience. Nor, as Table 4.5 shows, is divorce mediation a very significant proportion of the overall caseload of those responding to the survey. Indeed, while we did not attempt to break down the services, on average,

respondents estimated that only about 51 percent of their income came from the activities shown in this table. As we would expect, there are substantial differences between court-based and private practitioners. For the former, 81 percent of their income comes from those activities compared to 26 percent of those in private practise.

Table 4.5

Distribution of Caseload

Activity	Percent
Personal counselling	18.7
Marriage counselling	13.2
Separation counselling	19.2
Divorce mediation	14.5
Custody assessments	9.6
Other	12.6

2) Comparison Between Sites

Other kinds of differences can also be observed between court-based, community-based and private-practise mediation in terms of when mediation occurs and the source of the referral (Table 4.6). With respect to the former, it is apparent that mediators deal with couples at various points in the uncoupling process, but most frequently after the couple have actually separated (47 percent) and when legal proceedings have been initiated or are in process (26.7 percent). Of some interest is that, overall, about 11 percent of the cases seen by divorce mediators are after divorce or legal separation, presumably to deal with ongoing problems of access. As we learned, particularly where joint custody is encouraged, the majority of clients requesting post-divorce mediation were those attempting to work out shared parenting arrangements.

Table 4.6
Categories of Divorce Mediation
Cases by Type of Practise
(Percentages do not add to 100 percent)

Category	Type of Practise			
	Court-Based	Private Practise	Community-Based	Total
Marriage counselling leading to divorce mediation	5.8	24.1	20.7	16.4
After separation	58.9	34.6	48.9	47.0
After legal proceedings	17.1	24.3	12.3	18.9
After initial court hearing	11.1	5.6	5.8	7.8
Post-divorce/ post-separation mediation	15.4	6.9	10.8	11.0

The main difference between court-based and other mediation services is that, for the former, there is less likelihood of dealing with clients who may still be undecided as to whether to end the marriage and for whom reconciliation is one possible outcome of meeting with a counsellor/mediator. Also, they are, as would be expected, more likely to be involved with couples after court hearings have begun and after the case is settled legally.

As Table 4.7 shows, divorce mediators in private practise or in community-based agencies, receive a higher proportion of their referrals from lawyers than do court-based divorce mediators. Aside from self-referrals, court-based mediators main sources of cases are court intake procedures and referrals from the court, itself.

Table 4.7
Referral Sources of Divorce Mediation Cases by Type of Practise

Referral Source	Type of Practise			
	Court Based	Private Practise	Community Based	Total
Result of marriage counselling	5.3	19.0	14.6	13.8
Lawyers	13.3	33.0	22.3	
Court intake	21.6	4.1	8.9	11.9
Court referrals	17.5	4.2	5.6	9.6
Self-referrals	31.5	27.0	39.4	31.6

Divorce mediators estimate that, on average, couples attend 3.5 mediation sessions. Here, again, there are differences when the type of service is considered. The average number of sessions is 2.4, 4.6 and 3.4 for court-based, private practise and community-based services, respectively. That divorce mediators in private practise report more referrals from lawyers than those in court-based services is also reflected in what lawyers said in the mail survey: 54.5 percent prefer to refer clients to private mediators and only 15.3 percent prefer court-based services; the rest, 30.1 percent, indicated no preference.

It is of interest to compare these findings on Canadian mediation with those of the United States. As Kenneth Kressel observes, "private sector mediation is much more likely to be a voluntary process--one is almost tempted to say a "word of mouth" process. Thus, private mediators report that more than half (56 percent) of their clients are self-referred, with less than a third entering mediation at the suggestion of another professional such as an attorney or a therapist. Fewer than 10 percent of all private mediation involves referral from the court. In the public sector the situation is reversed, with 82 percent of all referrals coming directly from the court and only 16 percent by self-referral".[71]

While we return to settlement rates later in this Part, it can, at this point, be noted that another difference between court and non-court based mediation, is that the latter estimate that a greater proportion of their cases end in reconciliation.

---

71 Kressel, p. 181.

This is no doubt due to the greater mixture of marriage counselling cases in the caseloads of non-court based services and the fact that most court-based services do not, officially, offer reconciliation counselling. As can be seen in Table 4.8, the overall settlement rate is estimated by mediators at about 54 percent of cases and, in another 17 percent there is, at least, a "narrowing of issues". While we are not entirely sure what this latter concept means, it is viewed by mediators as one outcome of mediation.

Table 4.8
Estimates of Divorce Mediators of Case Outcomes by Type of Service

	Type of Service			
	Court Based	Private Practise	Community Based	Total
Reconciliation	6.4	20.7	10.8	13.1
Settlement	56.5	48.7	57.8	53.6
Narrowing of issues	16.2	18.1	16.6	17.0
Intractable disputes	15.4	13.8	13.3	14.3

Some final differences centre on how the three types of sources report involvement of lawyers in the mediation process. Overall, 40 percent of mediators are unable to identify any particular pattern as to when lawyers are likely to be involved. But, private practitioners it seems, have both more and more consistent patterns of involvement than do court-based mediators (Table 4.9).

Table 4.9
Lawyer Involvement in the Mediation Process by Type of Mediation

Point of Involvement	Type of Mediation			
	Court Based	Private Practise	Community Based	Total
Before mediation	22.0	43.8	25.0	31.4
During mediation	1.7	23.4	11.1	12.6
After settlement	13.6	12.5	11.1	12.6
No pattern	58.9	20.3	47.2	39.6

These differences are clearly an outcome of the structural differences between court and non-court based services and the greater likelihood that referrals to private-practise mediators will have come from lawyers since there is little difference between the three in their preferences for when lawyers should be involved: 41 percent would prefer it to be after, 22 percent

during and 37 percent have no particular preference. And, in terms of their assessment of their relationship with lawyers, 78 percent of mediators chose "cordial" (Table 4.10). Court-based mediators apparently have a somewhat better relationship with the legal profession then do those in private practise.

Table 4.10
Relationship with Lawyers by
Type of Mediation Service

Relationship	Type of Service			
	Court Based	Private Practise	Community Based	Total
Cordial	87	75	68	78
Distant	8	9	11	9
Hostile	2	5	--	3
No relationship	3	6	11	6
Other	--	5	11	4

Interaction Between Lawyers and Mediators

Over the past decade much has been written of the supposed evils of the adversarial system and the need for alternative to this apparently inappropriate and harmful approach to resolution of disputes related to marriage breakdown. In Part 2 and, in earlier reports, we have summarized most of the arguments against the adversarial approach. We do not, here, propose to do so again and would merely note that much of the criticism--whether from those writing for the Law Reform Commission or in mediation books and journals--has often been highly polemical and one-sided. Indeed, as Kenneth Kressel has observed, there is a certain irony in the fact that those committed to compromise and non-adversity have, perhaps, inevitably, introduced an adversarial quality into these anti-lawyer, pre-mediation rhetoric and polemic.[72]

It is, of course, difficult to read the books and articles of the leading proponents of divorce mediation and not be influenced. This is particularly so when that segment of the legal profession concerned with law reform seems to be ? much the same set of criticisms and concerns about the traditional family law regime. We expected, then, to find lawyers practicing family law who would be indifferent if not antagonistic to divorce mediation and its goals and objections. And, while we respected the concerns of the legal profession about the ability of mediation adequately to protect people's rights and to produce settlements which would stand up in court, we retained a degree

---

72 Kressel, p. 185.

of skepticism about how much of the concern with mediation was based on abstract notions of justice and how much was a self-interested concern with its impact on the livelihood of lawyers.

As we shall try to outline in the following paragraphs, the experience of doing this research has forced us to change our tune. The basic is that if there was a case to be made about the deleterious effects of the traditional adversarial approach, it has, to a great extent, been diluted, and in some ways undermined, by changing philosophies, attitudes, and practices within family law in Canada. In the latter part of the 1980's, it is, we think, more difficult to maintain the black and white position of anti-lawyer, pro-mediator which had a high degree of credibility only a few years ago; the approaches of many family law practitioners and those of divorce mediators have merged, have formed a grey area in which it becomes increasingly difficult to assume that researchers can expect significant differences in outcomes between cases handled by lawyers through negotiation and those dealt with through divorce mediation.

In other words, we had been led to believe that we would find a kind of "clash of cosmologies" between lawyer goals and mediator goals. An important question, under the general rubric of process, then, was how, if there are substantial differences between the two in goals, philosophy and attitudes about divorce, this would affect the development and use of mediation. At present, most people about to undergo a divorce are most likely to contact a lawyer and to do so on the advice of friends and relatives. Thus, through their advice and their approval of this alternative,, family law practitioners are an important sorting mechanism in terms of whether clients attempt to mediate their dispute. This is especially so for divorce; those seeking a legal resolution under provincial legislation are more likely to be influenced by the intake process of the family court. In the following paragraphs, we examine thoughts, attitudes and practices of family law practitioners and then compare their more general attitudes and philosophy with those of divorce mediators.

As we have described, our data on family law practitioners comes from two sources: personal interviews with lawyers in each research site who were identified by the researchers as doing a considerable amount of family law and a more structured mail questionnaire sent to a sample of Canadian lawyers who the Canadian Bar Association has identified as "having expressed an interest in family law". In the two smaller sites, we interviewed virtually all of the lawyers who are heavily involved in family law. In Montreal, we interviewed a sample of about 25 of the many lawyers who appeared from court records to be regularly in the Family Division.

Family Law Practitioners: General Impressions

One of our most striking impressions from the interviews was the very different relationship which, for purely structural reasons, lawyers in each of these three jurisdictions have to one another, to the court and to the court-based mediators. In Montreal, we have counted over 400 lawyers who have appeared regularly or sporadically in the family division. In contrast, in Saskatoon and St. John's, the figure is somewhere between 30 to 40 with only about half of these being primarily family law practitioners. In St. John's, virtually all lawyers have their offices in old houses next door to one another and in close proximity to the main court house. As one would expect, they know one another extremely well and, in the course of the interviews, generally recommended who, in other law firms we should interview. This was also our experience in Saskatoon, where, again, lawyers tend to know each other extremely well.

One we can draw from this difference in scale is that in smaller communities, lawyers are in a very good position to predict how their colleagues will respond to particular situations and, of course, how the judge (or judges) will view a particular argument or proposed settlement. As well, they will be familiar with all of the court staff and, as we learned, know personally those few individuals who do custody assessments on a contractual basis and/or offer private mediation. Thus, as we found, views about the role of mediation are cast in less abstract terms and were coloured by their personal like or dislike for the court and non-court based mediation in the community.

Clearly, the situations in larger cities such as Montreal are quite different. There is a much greater probability that lawyers will not know their opposite or at least with the same degree of familiarity. Nor can they always know in advance who, among the many judges will be presiding over their particular case. It is, perhaps, for this reason that, as we have described, Montreal lawyers seem to do much of their negotiation face-to-face just prior to going into court. Our observations and interviews in smaller cities suggest that much of the negotiation takes place over the telephone, in casual encounters and, sometimes, informally, over lunch.

While it is unlikely that one can tease out data to test such a hypothesis, it does seem reasonable to conclude that divorce mediation will have more impact and be of more assistance to couples in larger and, of necessity, more formal legal contexts. To date, divorce and divorce mediation have been analyzed in something of a vacuum. The emphasis has been on either global statistics--percent of divorces contested, numbers involving children and so on--or at a more abstract and universal level of the social psychological process involved in marriage

break up and dispute resolution. Left out is discussion of how such variables as community size may be an intervening structural variable between, on the one hand, the demographic and, on the other, the social psychological.

Another general impression shared by all of the researchers carrying out the interviews with family law practitioners is that few fit into the stereotype of the litigious divorce lawyer concerned only with winning his or her case and with collecting an exorbitant fee at the end of the process. Kenneth Kressel, on the basis of his study of the matrimonial bar in New Jersey found that "lawyers are not of one piece", that "their respective attitudes toward the job could scarcely be more different". On the basis of a standardized research instrument, he dichotomized his American sample of lawyers into what he calls "counsellors" and "advocates". In the mail survey, we replicated (with some modification) most of the components of his "Lawyer Role Questionnaire" and draw upon this in the next section, particularly in comparison with mediators who were asked in the mail survey to respond to substantially the same set of questions.

At this point, it can simply be noted that lawyers we interviewed do not fit neatly into either the category of the "hard, bitter and cynical advocate" or the "do-gooder counsellor". Rather, at worst some seem to be divided in their attitudes and ambivalent about the role of mediation while others seemed highly sympathetic to this approach. At the same time, it should be noted that we were interviewing only those who do a sizeable amount of family law. Many of these lawyers told us that the most litigious lawyers they encounter are those who do mainly civil litigation and take on a family law case as a favour to an existing client.

In any event, while virtually all of the lawyers we interviewed are prepared and do enter into litigation where necessary, the vast majority prefer to negotiate a settlement. The main reason for preferring negotiation centres around the belief that people are more satisfied and more likely to live with a negotiated settlement than with one imposed by the court. Some also pointed out that, in the majority of family law cases, there is no financial incentive to go to trial because, usually, the lawyer cannot bill for all of the time involved or, at least, has trouble collecting. Most would prefer to do many simple uncontested cases than a few expensive and protracted custody cases. As well, some also noted that the outcomes of litigation are often unpredictable, making it preferable to negotiate whenever possible. Finally, some pointed out that even though the client wishes to be litigious, they cannot always acquiesce to his or her demands; they deal with the client one time only but must deal regularly with the lawyer for the other party.

In contrast to the experience of the unified family court evaluations, lawyers we interviewed are not explicitly opposed to divorce mediation and are not particularly concerned about either its impact on protecting people's rights, on their role in family law or on their livelihood. Indeed, many could give reasons why it is advantageous for people to mediate their disputes and some claimed to be advising their clients to attempt mediation.

But, as we look at the court files and talk with the court-based mediators, it is apparent that the actual number of referrals is quite insignificant; about 12 percent of referrals to the court-based services in the three research sites could be identified as a direct referral from a lawyer. And, as the mail questionnaire results show, while about 85 percent of lawyers advise clients about the existence of mediation, in only 10.4 percent of their cases, is there actual encouragement to attempt divorce mediation.[73]

A final impression is that among the lawyers interviewed, there is little interest in doing mediation themselves. While, in each of the three research sites there are some who have either taken mediation training or intend to do so, there is hardly the groundswell of interest sometimes reported at conferences and elsewhere. Confusing the matter, somewhat, is that a number of lawyers do not make an analytical distinction between negotiation and mediation and claimed that much of the time they are, in fact, doing mediation. Others simply have no interest or do not see mediation as a suitable role for lawyers. Too, some pointed out that there are financial disincentives in becoming involved in mediation; due to conflict of interest, it would be necessary to send the client to another law firm for legal consultation and representation. This would seem to be the case whether or not the mediation was successful.

Overall, findings from the mail survey of family law practitioners tend to mirror these more general impressions. In all, 220 lawyers responded to this survey (about a 20 percent response rate). Even for mail surveys, this is a low response rate and we cannot, therefore, claim that this sample is representative of all family law practitioners in Canada. One expectation was that those with particular concerns about divorce mediation would be the most likely to respond to the questionnaire. However, if there is a bias it is probably towards those lawyers who take a less litigious approach to family law, what,

---

73 There are some differences by degree of specialization in family law. Lawyers whose practice consists of more than 50 percent family law encouraged about 16 percent of their clients to attempt mediation, compared to 7 percent of those who do less than 50 percent family law.

on the basis of our interviews, we believe to be the dominant pattern among Canadian family law practitioners.

The majority of lawyers who responded were men (72 percent) with, on average, 12 years experience in law. Only about two-fifths reported more than 50 percent of their caseload is made up of family law cases. Most (72 percent) have seen their family law practice increase though 30 percent would prefer to do less family law than at present. The average fee charged for a divorce was estimated at $1337.00 and for a separation agreement or order under provincial legislation, $974.00. About two-thirds indicate that their fee varies depending on the income of the client. About half of those responding to the survey are partners in their firm and slightly over one-fifth practise alone.

While we know that less than 5 percent of divorce cases are actually litigated, lawyers gave us an average estimate of 73 percent of cases as initially and, in some way, contested.[74] As be learned, it is far from clear as to what is and is not a contested case. Lawyer estimates, in fact, ranged from two percent to 98 percent which suggests that they share some of the definitions of "contestedness" outlined by the Montreal divorce mediators (see above).

The vast majority of these (93 percent) are, apparently, settled through negotiation with the other lawyer or discussion with the client (5 percent). The lawyers report that only about one percent are settled as a result of mediation and less than one percent as a result of custody assessments. Where there are disputes, most (83 percent) prefer to negotiate a settlement while 16 percent view both a court settlement or a negotiated settlement as equally preferable.

Lawyers were presented with a list of possible advantages of negotiating rather than litigating a settlement. Their responses are shown in Table 4.11 (since respondents could choose more than one category, percentages do not add to 100 percent).

---

74 The most commonly mentioned figure is 5 percent of family law cases go to litigation. Recent Central Divorce Registry statistics show an average of 2 percent going to trial with considerable variation by jurisdiction. Part of the difficulty is that cases which were slated to go to trial are sometimes settled prior to the court hearing. And, presumably, some which started out as uncontested cases become contested at a later stage.

Table 4.11
Main Advantages of Negotiation

Advantage	Percent
Less costly to clients	86
More binding in parties	29
Better use of lawyer's time	38
More predictable outcomes	57
Other (client satisfaction)	29
No particular advantage	2

In terms of awareness of and attitudes towards mediation, we can note, first, that 91 percent are aware of the services in their community and, as mentioned earlier, some 85 percent report that they advise their clients about mediation.[75] However, in answer to the question of whether they are more likely to advise clients to seek personal counselling rather than divorce mediation, 29 percent said personal counselling, 23 percent divorce mediation and 42 percent said both about equally. In other words, as our interview data suggested, lawyers are more likely to call upon services in their community when one or both of the parties is perceived as having serious emotional problems. At the same time, while some 75 percent of lawyers would refer intractable disputes to a divorce mediator, only three percent of lawyers would do so if the client has serious emotional problems. In contrast, only 31 percent would encourage their clients to attempt mediation when the main issues in dispute are custody and access.

Turning things around, we asked under what circumstances lawyers would not refer clients to mediation with the following results (again, since respondents could choose more than one response, percentages do not add to 100 percent).

Table 4.12
Circumstances Where Clients Would Not Be Referred to Divorce Mediation

Circumstance	Percent
When there is extreme hostility	39
Where is a history of wife or child abuse	30

---

75 Both the interviews and the mail survey were conducted after the Divorce Act, 1985 came into force.

Table 4.12 (continued)

Circumstance	Percent
When the client is emotionally unadjusted to separation	47
When there is an imbalance of power between spouses	46
When issues can easily be negotiated	2

If there are s to be drawn from this table and from other responses in both the interviews and mail survey, it is that lawyers do not view divorce mediation as a very feasible alternative when there are emotional problems or power imbalances to be overcome.

It is apparent that lawyers share some of the confusion about what is the appropriate involvement and timing of the involvement of lawyers in the mediation process: 60 percent believe that the lawyer should be involved at all stages while 40 percent believe that their role should be limited to reviewing the final settlement. At the same time, 88 percent of lawyers would continue legal proceedings while divorce mediation is in progress. Finally, it is of interest that 31 percent of lawyers favour mandatory mediation where custody and access are in dispute and another 50 percent gave qualified answers, suggesting, for example, that there should be greater use of custody assessments and interviews during the court hearing of all parties to the dispute. Only 11 percent gave a categorical "no" to this question. Given the supposed concern of the legal profession with mediation of financial and property matters, it is also of interest that 70 percent of lawyers believe that divorce mediators should deal with custody, access and maintenance while only 14 percent believe that it should be limited only to custody and access. Less than one percent believe mediators should deal with property matters and about 15 percent either don't know or were disinclined to answer this question.

Mediators and Lawyers: A Clash of Cosmologies?

Inherent in much of the literature is that divorce mediation starts from very different premises than do lawyers practicing family law. An integral part of our surveys of both groups was an attempt to determine exactly how far apart the two are on three different areas: 1) goals of settlement; 2) obstacle to settlement; 3) and attitudes about divorce mediation. Each area included a number of statements and asked respondents to scale these using a scale of one to ten for one area and one to seven for the other two areas.

Looking first at goals of settlement (Table 4.13), what is most outstanding is the similarity between the two groups. Some items were included which are relevant only to one of the two groups. It is apparent that the one important difference is that lawyers do not see themselves having responsibility for ensuring the best interests of the children. As some pointed out in the interviews, this, in their view, is for the judge to decide. But, overall, the to be drawn here is that lawyers and mediators are not very far apart in what they strive to achieve in a divorce or separation settlement.

Again, borrowing heavily from Kressel's "Lawyer Role Questionnaire", both groups were asked to scale a number of possible obstacles to settlement. Average scores for the two groups are compared in Table 4.14.

Table 4.13
The Goals of Settlement:
Average Ranking of Lawyers and Divorce Mediators

Goal of Settlement	Mean Score	
	Lawyers	Mediators
Getting my client the best possible financial settlement	8.1	*
Getting a settlement my client (the couple) is satisfied with regardless of how anyone else feels about it	6.7	6.9
Reaching a settlement which I feel is equitable to both parties	6.8	6.4
Getting a settlement which both parties feel they can live with	7.4	9.0
Creating a cooperative post-divorce/post-separation climate between the ex-spouses	7.3	8.3
Protecting the welfare of the children	3.6	9.4
Achieving emotional health and adjustment for the clients	4.7	6.0

Table 4.13 (continued)

Goal of Settlement	Mean Score Lawyers	Mediators
Getting the best possible economic settlement for the custodial parent	*	4.6
Ensuring that children have ongoing contact with both parents	2.4	9.6

* Not asked for that group. (1= a goal I usually do not strive for; 10=a goal I usually do strive for)

Table 4.14
Obstacles to Settlement:
Average Rankings of Lawyers and Mediators

Type of Obstacle	Lawyers	Mediators
The inherently neurotic personality of most divorcing or separating people	3.6	3.5
The temporary emotional instability of people whose marriage has broken down	4.7	5.0
Differences of settlement goals between you as the lawyer and your client	2.8	*
The timing of when people enter mediation	*	4.7
The highly charged emotional atmosphere between the spouses	4.9	5.3
The lack of clear criteria as to what constitutes a reasonable settlement	3.1	3.4
The ambivalence of clients as to whether they really want a separation or divorce	2.2	3.5

Table 4.14 (continued)

Type of Obstacle	Lawyers	Mediators
The advice people receive from their lawyers	*	4.2
Unrealistic expectations about what is materially or legally feasible	4.2	4.3
The amount of property or assets available for division	3.7	3.2
The impoverished situation of the family prior to marriage breakdown	3.3	3.0
The attitudes or training of certain family court judges	2.6	2.4

* Not asked of both groups. (1=usually not a major obstacle; 7=usually a major obstacle)

As in Table 4.13, a few items were, for obvious reasons, posed to one group but not to the other. Again, what emerges most clearly is the degree of similarity between the two groups: for both, the major obstacles are those related to the emotionality, ambivalence and unrealistic expectations of those in the process of ending their marital relationship.

Finally, in an effort to gain some further insight into lawyers' attitudes about mediation and to compare these with how mediators see their contribution, both groups were asked to indicate their level of agreement/disagreement with a number of claims made by proponents and opponents of divorce mediation. As will be seen in Table 4.15 these were posed, deliberately, in rather black and white terms.

Table 4.15
Level of Agreement of Lawyers and Mediators
About Advantages and Disadvantages of Divorce Mediation

Statement	Mean Level of Agreement/Disagreement	
	Lawyers	Mediators
Divorce mediation relieves lawyer of having to deal with clients' emotional problems.	3.9	3.4
Mediated settlements are more long-lasting then those reached through negotiation or litigation.	3.4	2.2
Overall, costs of obtaining a divorce will be less where clients choose to mediate their settlement	3.0	2.0
Divorce mediation services in or near the court can reduce court workloads and costs.	3.5	2.2
Divorce mediation protects children's rights and interests better than adversarial approaches	3.2	2.2
Divorce mediation helps to promote the overall welfare of the family during and after the divorce or separation.	3.9	2.0
Settlements reached through divorce mediation are often not legally or technically correct.	4.3	5.1
Divorce mediation does not adequately protect people's rights.	4.9	5.5
Divorce mediation undermines the role of the lawyer in separation and divorce.	4.2	5.6

Table 4.15 (continued)

Statement	Mean Level of Agreement/Disagreement	
	Lawyers	Mediators
One result of divorce mediation may be settlements which are unfair to women who often have less experience than men with negotiation.	3.8	5.0
Divorce mediation prolongs an already lengthy process.	4.0	5.9
Cases which are likely to be successfully mediated would have been as easily settled by lawyers or the parties themselves.	3.8	5.7
Men are more likely to pay their maintenance when the quantum is determined through mediation then by the court.	2.2	3.0

A neutral position is four. On positive statements, the average score is 2.0 for mediators and 3.3 for lawyers. On negative statements the average is 5.5 for mediators and 4.2 for lawyers. In other words, while there are, surprisingly, not great differences between the two, predictably, mediators show stronger agreement about the supposed benefits of divorce mediation and, in turn a higher level of disagreement about its possible disadvantages. Lawyers, rather then antagonistic, on the whole, appear either neutral or ambivalent about both the positive and negative aspects or consequences of divorce mediation.

In all three tables, we have presented averages and it is apparent that these can mask the variation in responses. And certainly, some lawyers and mediators did use the whole continuum for each of these scales. However, a number of possible breakdowns of both data sets have failed to indicate any systematic differences in attitudes about mediation, obstacles to and goals of settlement. For example, male lawyers are no more or no less predisposed towards or against mediation or have different views about the goals and obstacles to settlement than do female lawyers or mediators. Nor could we find a relationship between level of involvement in family law and any of these attitudinal measures. Similarly, scores of mediators in court-based, private practice and community-based settings were virtually identical for all of the items in each of the scales.

On the basis of the qualitative interview data and these more systematic comparisons, it is hard not to agree with Kressel's that mediation is an alternative form of dispute resolution probably no better or worse than the traditional approaches of negotiation. Both groups of practitioners perceive themselves as facing much the same set of obstacles and, as a result, face many of the same tensions and difficulties.

THE NATURE OF MEDIATION AND NON-MEDIATION CLIENTS

An important component of the process evaluation is the question of who uses divorce mediation services and who does not. The reason, of course, is that critics of evaluations of divorce mediation have often raised the issue of self-selection. That is, are those who voluntarily choose to mediate their settlement different, in important ways, from those who do not. In the following paragraphs and tables, some general characteristics of the two groups are described using both data from the court records and from the client interviews. Clearly, most of the divorce mediation clients also had experience of the legal system; our use of the terms "mediation" cases and "non-mediation" cases is for purposes of readability and to simplify the accompanying labels. For similar reasons, we do not, in every table and comparison attempt to break down the data by the three research sites and do so only where there are, in our view, relevant differences which should be noted.

Income

As can be seen in Table 4.16, those who participated in mediation have somewhat higher incomes than those who did not. Overall, the difference is about $100.00 per month for women and about $207.00 per month for men. The largest differences are in Montreal; $224.00 and $369.00 for women and men, respectively. And, for reasons which are not clear, the situation is reversed in Saskatoon. There, both men and women who attended mediation have slightly lower incomes than do those who used a purely legal process.

The Case Analysis data indicate that mediation clients are nearly twice as likely as non-mediation clients to have incomes above $20,000 per year (43.4 percent and 24 percent, respectively). While, as would expect, court records show men's incomes are much higher than women, for both, there are consistent differences between mediation and non-mediation clients.

Table 4.16
Monthly Income Before Deductions of Mediation and Non-Mediation Clients by Sex and Research Site (Client Interview Data)

Females	Mediation	Non-Mediation
Montreal	1722	1498
Saskatoon	1210	1359
St. John's	1299	1165
All Sites	1432	1332
Males		
Montreal	2700	2331
Saskatoon	2193	2224
St. John's	1580	1431
All Sites	2287	2080

Table 4.17
Annual Income of Mediation and Non-mediation Clients

Income Category	Mediation	Non-mediation
Under 10 000	31.4	42.1
10 000-14 999	13.2	20.9
15 000-19 999	11.9	13.1
20 000-29 999	23.3	12.6
30 000-39 000	11.9	6.2
above 40 000	8.2	5.1

Employment and Occupational Status

While there is almost no difference in employment status between the two groups, mediation clients are more likely than non-mediation clients to be employed in a non-manual or opposed to a manual occupation, 49 percent and 29 percent respectively. And, whereas only about 10 percent of non-mediation clients work in professional occupations, more than one-quarter (26.2 percent) of mediation clients do so. With this one exception, there are not major occupational differences between the two groups.

Education

Mediation clients, both women, and men, are somewhat better educated than non-mediation clients. Overall, some 55 percent of mediation clients have educational attainments beyond completing high school compared to about 40 percent of non-mediation clients. While men, generally, have higher education attainments than women, the pattern of differences is similar when mediation and non-mediation clients are considered separately by sex.

Home Ownership

At the time of our interviews, 42 percent of female mediation clients were living in their own home (as opposed to renting or other arrangements) compared with about 29 percent of female non-mediation clients. There are no similar differences among male clients: about 40 percent of each group are living in their own home.

Other Characteristics

In a variety of other variables, there are not systematic or patterned differences between mediation and non-mediation clients or, at least, none which appear to be of much predictive or practical significance. Mediation clients, for example, had, at the time of approaching the court, been married for an average of 11.4 years and separated for 20.2 weeks whereas non-mediation clients had been married for an average of 10.5 years and separated for 27.1 weeks. The average number of children is just slightly over 2.0 for both groups. And, as Table 4.18 shows, the age structure of children in these families differs very little between the two groups of clients.

Table 4.18
Age Structure of Children for Mediation and Non-mediation Clients

Age Structure of Children	Mediation	Non-mediation	Total
All under six	36.9	43.6	42.3
Six to twelve	23.4	19.1	20.0
All under twelve	11.9	10.8	11.0
Twelve to eighteen	17.7	19.0	18.8
Mixed ages	9.6	7.4	7.8

Nature of Separation

While there are some differences in perceptions between men and women over this question, it appears that, in a majority of cases, it was the wife who initiated the separation or divorce (Table 4.19).

Table 4.19
Party Initiating Separation

Party mediation	Mediation Clients	Non-Clients
wife	60.3	59.8
husband	29.4	31.3
joint	10.3	8.9

But, again, there is virtually no difference between mediation and non-mediation clients in this respect. Similarly, while about 20 percent of men and 28 percent of women reported one or more previous separations, there are only trivial differences between mediation and non-mediation clients. There are, however, some differences between the two with respect to discussions about and attempts to reconcile. Thus, 46 percent of mediation clients compared to 33 percent of non-mediation clients had discussed the possibility of reconciliation and 68 percent of the former compared to 54 percent of the latter had made an actual attempt at reconciliation. This was usually in the form of marriage counselling (85 percent of mediation clients and 70 percent of non-mediation clients) as opposed to living together.

Alleged Grounds for Divorce

In Canada, prior to the Divorce Act, 1985, two-thirds of divorcing couples used one of the marital offenses rather than one of the indications of marriage breakdown. However, as Table 4.20 reveals, these aggregate statistics mask the considerable variation between provinces. Particularly notable are Alberta and Quebec where over 80 percent of petitions were filed on the bases of an alleged marital offence, proportions nearly double those in Prince Edward Island and Manitoba.

Table 4.20
Use of Marital Offenses and Marriage Breakdown as Grounds for Divorce, Canada and the Provinces, 1984

Province	Marital Offence	Marriage Breakdown
NFLD	54.1	45.9
P.E.I.	42.4	57.6
N.S.	72.8	27.2
N.B.	58.5	41.5
QUE.	80.4	19.6
ONT.	49.7	50.4
MAN.	44.5	50.4
SASK.	60.8	39.2
ALTA.	85.4	14.6
B.C.	55.7	44.3
YUKON & NWT.	54.1	45.9
CANADA	66.4	33.6

Source: Adapted from Statistics Canada - Marriages and Divorces, Vital Statistics, Volume II (Whole numbers turned into per- centages)

Data from the court records in the four research sites give a similar picture to what is found in the National Statistics. Overall, some 55 percent of divorcing couples used one or more marital offenses as the alleged ground for their divorce though there are variations between research sites. With the exception

of Saskatoon, fault grounds are more likely to be used when women are the petitioners.

Of particular interest is that in all of the research sites, mediation clinics were more likely than non-mediation clients to use as the basis of their divorce, alleged offences (Table 4.21).

Table 4.21
Use of Marital Offenses for Divorce by Research Site for Mediation and Non-mediation Clients

Research Site	Type of Client		
	Mediation	Non-mediation	Total
Montreal	87.5	79.4	80.9
Saskatoon	70.5	59.2	59.9
St. John's	61.1	45.4	46.8

This is, perhaps, not surprising, since we would expect that those attending mediation at the time of our research and filing a divorce petition would not be those who have waited out the three years required under the previous divorce legislation (the main indication of marriage breakdown). As we discuss, later, clients wishing to use the three-year period or to divorce later, and who attend mediation will have sought a separation agreement.

Issues Initially in Dispute

Overall, one-third of clients we interviewed could recall no issues in dispute. Table 4.24 indicates that this is less likely to be true for those who attended mediation than for non-mediation clients generally. Indeed, on all but one are of possible dispute, mediation clients were more likely to indicate that the matter was in dispute. However, with the exception of the matter of custody, differences between the two groups are not all that large. On average, about 20 percent of the non-mediation group and 26 percent of the mediation group had one or more issues which they regarded as in dispute. In short, rather than the most reasonable of divorcing couples, an often made contention, mediators appear to be dealing with a somewhat more contentious group of people than is found in the divorcing population generally.

Issues Initially in Dispute for
Mediation and Non-mediation Clients

Issue	Mediation	Non-Mediation
Nothing to Dispute	24.4	37.7
Grounds	12.4	11.9
Access	33.1	22.5
Spousal Support	40.3	36.2
Maintenance	14.9	16.3
Family Home	22.9	13.9
Property Division	34.0	25.1
Payment of Debts	12.2	8.1

CLIENT PERCEPTIONS OF DIVORCE MEDIATION

Earlier sections of Part 4 have presented our observations of the mediation services in the three research sites. In this final section, we examine clients' views about mediation and, as well, their views about the legal process and their experience with lawyers. We begin with the obvious question of why people did not consider mediation. From Table 4.23, it can be seen that the most cited reason was that people were unaware of the service or of mediation, generally. What is also of interest is that about one-fifth of our respondents were of the view that mediation services were not available to them. This is surprising given that we were interviewing clients in jurisdictions with court-based services which are free to anyone approaching the court.

As the unusually large category for "other" in Table 4.24 suggests, clients learned about mediation in which ways which go beyond the most obvious categories we could think of or which name up in coding the initial sample of cases on which we based the coding frame. Short of recoding this question we are, for about two-fifths of cases, uncertain as to how people did learn about and come to choose divorce mediation. Of some importance is that only about 15 percent of clients explicitly recall that they learned about mediation from their lawyer. As noted earlier, data from the court records are in accord with this figure: only about 12 percent of referrals came directly from lawyers.

Table 4.23
Distribution of Reasons for not Considering Mediation

Reason	Women	Men
Unaware of it	36	30
No Disputed Issues	17	19
Too Much Hostility	10	13
Ex-spouse unavailable or unwilling	9	6
Services Unavailable	19	20
Other	10	13

Table 4.24
How People Learned About Divorce Mediation

Method	Women	Men
Lawyer	12	18
Media	10	9
Friends/relatives	21	18
Visit to Court	13	7
Judge	2	5
Other	42	43

There is some disagreement between men and women as to who suggested mediation though overall, it appears that in about 44 percent of cases it was the wife who suggested trying mediation or separation counselling.

Table 4.25
Who Suggested Going to Counselling or Mediation

Party	Women	Men
Wife	57	32
Husband	22	40
Both Equally	5	9
Neither-referred	7	9
Other	9	11

We also asked everyone what they hoped to get or to achieve from counselling or mediation. On the whole, as Table 4.26 suggests, women gave us more amorphous and uncodable answers than did men. What is somewhat surprising is that 26 percent of men compared to only 8 percent of women had in mind attempting to save the marriage. It can be noted in passing that about 55 percent of clients recalled that the possibility of reconciliation was raised during mediation and appears to have been actively encouraged in about 11 percent of cases.

Table 4.26
Expected Outcomes of Mediation or Separation Counselling

Outcome	Women	Men
Total Settlement	27	28
Custody Decision	8	18
Resolve/avoid violence	3	1
Property Division	2	2
Maintenance Agreement	3	1
Reconciliation	8	26
Information/ Reassurance	10	4
Other (emotional help)	40	20

As we look through the interviews and the comments recorded by the interviewers, it is possible to see at least three separate groups or categories within the sample of people who attended mediation. First, we found couples who have already worked out an agreement and simply want to review their arrangements in order to have them made legal. This group came to mediation primarily for information on how to proceed legally and for reassurance that what they have worked out is, in fact, in the best interest of the children. In other words, some who go to mediation want an expert opinion that what they are proposing to do is just and equitable and won't do harm to the children.

A second category includes couples who want to reach an agreement on the issues related to the breakup of their marriage but are afraid to try and settle these directly between one another; though not openly hostile or in disagreement, there is the fear that things would soon escalate into bitter conflict if left to their own devices. In this group are also some who feared that lawyers would make things worse by exacerbating the level of conflict. Finally, there are those couples who are already in conflict over one or more issues and who, almost as a last resort, want the help of a neutral third party to resolve the dispute and reach an agreement.

It was apparent, as well, that the line between counselling and mediation is, for most clients, not well-defined. As some pointed out, they attended counselling and/or mediation to help them get through the whole ordeal of ending their marriage, to try to diffuse some of the hostility and, as more than one person put it, "to smooth the conflict out for the sake of the kids." It should,perhaps also be noted that, particularly in the two smaller research sites, Saskatoon and St. John's, clients did not always know whether they had attended counselling or mediation. We had included these couples in our mediation group on the basis of court files, but, for some, the sessions they had attended seemed to us closer to counselling than to mediation, particularly as the ex-spouse was not always in attendance. This is perhaps inevitable in services which offer both separation counselling, some individual counselling and mediation. In the more focused and structured milieu of the Montreal service, clients were in far less doubt that they had undergone the task of mediating their settlement.

It appears that it is only in a small minority of mediation cases that children are involved in mediation sessions: 17 percent of women and 14 percent of men reported that their children had attended one or more sessions. It is of interest that among those clients whose children did not go to the mediation sessions, 92 percent of women and 84 percent of men preferred that the children not be involved. However, where children did attend mediation, 85 percent of women and 70 percent

of men felt that this was a good and useful thing to have done. No obvious s emerge from these findings except that they do suggest that whatever people do or do not do, they are likely later to think it was the best route to take.

From time to time one hears from women that family law and family courts are set up by men to serve men. Men, in turn, see these institutions as run by women for the benefit of women. Certainly, in the family courts included in this project, men's perceptions are understandable since, in all of them, the majority of court staff, judges and lawyers they are likely to encounter are women. It was in this context that we enquired about the sex of the mediator and whether clients would have preferred a mediator of their own or the opposite sex. While about a fifth of women preferred to have their case dealt with by a woman, the vast majority of men (90 percent) and women (76 percent) were of the view that the sex of the mediator was not of concern and that then and, in retrospect, they had no particular preference.

Augmenting this are views about the fairness and impartiality of the mediator. Some 81 percent of women and men felt, at the time, that the mediator was fair and understood their situation. And, thinking back on what happened, 92 percent of those interviewed believe that the mediator had been fair and impartial. Similarly, 80 percent felt that they had been given an opportunity to express their concerns and feelings about the separation or divorce. For the small minority (57 people) who answered this question in the negative, the main reasons mentioned were that things were too hurried (30 percent) or the mediator was unsympathetic to them or their situation.

Finally, we asked all clients, not just those in the mediation group, what kind of advice they would give to a friend with a family law problem (this was, essentially, a forced-choice question). The results are shown in Table 4.27. It is apparent that a majority of those who attended mediation would recommend it to others. Men, on the whole seem to be more down on lawyers than women but both seem equally enthusiastic about the benefits of mediation since 70 percent recommend a mediator alone or a mediator and a lawyer.

Table 4.27
Advice to a Friend with a Family Law Problem
by mediation and non-mediation cases and sex

Advice	Women		Men	
	Med	Non-Med	Med	Non-med
See a lawyer	26	37	19	38
See a neutral Third party (a mediator)	47	32	51	29

Table 4.27 (continued)

Advice	Women		Men	
	Med	Non-Med	Med	Non-med
Work things out on their own	4	13	12	18
Use a mediator and a lawyer	23	18	19	14

In sum, the various questions we put to clients about mediation all suggest that those who mediated their case are highly satisfied with the experience. We looked hard for negative evidence but, for example, could find no indication that there were the kind of power imbalances sometimes mentioned as a criticism of this approach. And, in looking over our interview schedules and producing qualitative impressions from the interviews, it is apparent that few of these clients could find disadvantages to mediation. A few, particularly in Saskatoon, did mention the difficulty and expense of coming in from rural areas for the sessions and some wished that mediators would schedule more appointments at night. And, while not really a fault of mediation, some did comment on the rather false impression their ex-spouse gave during the sessions; he or she acted far more reasonably and cooperatively in that context than was usually the case.

At the same time, it must be noted that, for the most part, both those who did and did not attend mediation were also satisfied with their lawyer. Most, over 80 percent of men and 88 percent of women, found their lawyer to be helpful and understanding and let them express their needs. Both groups are, however, less sure that what the lawyer did was worth the cost. Thus, only about 51 percent of women and 44 percent of men felt that they had got their money's worth. Too, those who were dissatisfied with their lawyers were also extremely voluble and often bitter about how they had been treated or how the lawyer's actions (or, more often, inaction) had worsened an already difficult and stressful situation. But, to repeat, most people were satisfied with their legal representation and there was no difference between those in the mediation and non-mediation group.

If there is conflict between lawyers and mediators, as is sometimes implied at conferences and in the literature, it is not evident from the clients' perspectives. A little over half of those attending mediation did so after consulting or retaining a lawyer. Only a minority, about 8 percent, started seeing a lawyer during mediation. And, clients recollections indicate that in only about 13 percent of mediation cases did the lawyer disagree with what had been worked out.

Settlement Rates

Finally, as a prelude to Part 5, the outcomes of divorce mediation, it seems fitting to conclude this lengthy Part by looking at the overall success of mediation in bringing about a settlement. While this may seem an obvious question in a report devoted to a study of divorce mediation, mediators, and apparently clients, tend to think of the results of mediation as falling along a continuum between full settlement and no agreement whatsoever. In the middle are less clearly defined outcomes such as "partial settlement" and "narrowing of issues." And, as mediators like to joke, there is always the possibility of failure in divorce mediation: the couple may decide to reconcile. Thus, we present two different sets of data. The first set, shown in Table 4.28, is based on court records. Table 4.29, is based on clients' perceptions of the results of having mediated their divorce or separation case. Case analysis data indicate that complete settlement was reached in just under half of the cases. If to these are added those defined as a partial settlement, it could be concluded that mediation is successful in about 64 percent of cases. If the six percent of cases which resulted in reconciliation are excluded from Table 4.28, complete settlement was reached in 53 percent of cases and full or partial settlement was achieved in just over 68 percent of cases.Or, to put it the other way round, mediation was entirely unsuccessful in about 25 percent of cases: either the couple could not agree or the sessions were terminated by one or both parties. Separate analyses of the three research sites shows a remarkable degree of similarity in the results of mediation, to the extent that, at this point, there is little reason to show the results separately.

Table 4.28
Outcomes of Mediation
(Case Analysis Data)

Outcome	Percent
Reconciliation	6.3
Complete Settlement	48.6
Partial Settlement	15.4
Narrowing of Issues	5.1
No Agreement	16.2
Sessions Terminated	8.3

As Table 4.29 indicates, client perceptions give a somewhat different and, on the whole, less rosy picture of settlement rates from mediation. Only 38 percent of those we interviewed indicate that a full settlement was reached at the mediation stage. For another 20 percent there was either an agreement on some issues or partial agreement. Turning it round, 28 percent left mediation without an agreement, a figure reflected in the fact that about 34 percent of mediation cases were, in the final

analysis, defined by the parties as contested court cases. There is a slightly greater tendency for men to report that full agreement was reached on all issues but beyond this, there is little difference between female and male clients. Again, there are only small and unsystematic differences when the data are broken down by research sites.

Table 4.29

Clients' Assessments of the Results of Mediation
(Client Interview Data)

Results of Mediation	Women	Men	Total
Full Agreement	34.4	42.4	38.4
Some Issues Settled	16.8	8.8	12.8
Partial Agreement	7.2	8.0	7.6
Clarification of Issues	11.2	8.8	10.0
No Agreement	28.0	28.0	28.0

In the next Part we turn, in considerably more detail to an analysis of the intended and unintended outcomes of divorce mediation in comparison with those resulting from a purely legal process.

PART V: THE OUTCOMES OF DIVORCE MEDIATION

INTRODUCTION

This Part of the report focuses on intended and unintended outcomes of mediation. In terms of intended outcomes, our major focus is on maintenance, custody and access and post-divorce parenting and relationships. However, in the course of those analyses, we consider what the findings reveal with respect to the social impact questions discussed in Part II. While the overall goal is a comparison of mediated and non-mediated settlements, much of what follows is descriptive and is designed to fulfill the requirement for baseline data on maintenance and custody. We begin with the important issue of the impact of divorce and separation on the economic situation of men and women and their children and the role of mediation.

MAINTENANCE AND COMPLIANCE WITH MAINTENANCE ORDERS

Proponents of divorce mediation have long contended that, compared to adverarial settlements, mediation will lead to more equitable settlements and to greater compliance with the terms of the maintenance order. Underlying this contention is the notion that if means can be found to create more amicable settlements, one outcome should be a greater sense of economic as well as socio-emotional responsibility for children of the marriage. The belief, then, is that the traditional adversarial approach, where one "wins" or " loses", is antithetical to the goal of bringing men to recognize their ongoing economic responsibility to their children. Typically, in Canada, court-based mediators have not dealt with financial issues -- property or maintenance -- and have, rather, been restricted to attempting to mediate custody and access. Nevertheless, it seems unlikely that in working out a reasonable arrangement with respect to these two issues, that the question of maintenance--child support--would not arise in the course of the mediation sesssions. But, even where maintenance is not explictly discussed, it is reasonable to assume that one outcome of a mediated custody and access settlement will be an increased sense of responsibility about the economic well-being of the children.

Against the case for mediation is the now familiar argument of unequal bargaining power: women -- goes the argument -- because of their lack of experience with negotiation and financial matters require the services of a powerful advocate rather than a neutral third party. Divorce mediation is based on the notion that both parties are honest. Thus, it is difficult for women to confront their husbands as to their actual financial situation; as some feminists have argued, they

need the safeguards provided by the traditional adversarial system.[76]

Of course, things are not that simple. Our data indicate that those who mediate their settlement are as likely to be legally represented as those who do not. And, the settlement reached will still be scrutinized in court whether or not the parties have legal representation. It is not entirely clear on what empirical or logical foundation the feminist argument about unequal bargaining power is based. One intent of this section is to consider the impact of mediation on maintenance quantum and compliance with maintenance orders. But, along the way, we also set out the baseline data on these matters as requested as part of this project. This section draws heavily upon the just completed report on baseline data for phase I of the evaluation of the Divorce Act, 1985. It has been modified to take into account separation cases which in most tables and descriptions are shown separately.

ECONOMIC ASPECTS OF DIVORCE

Support objectives in both provincial and federal family law are intended to recognize the economic consequences arising from marriage and marriage breakdown and to relieve the resulting hardships. Awards for maintenance should also encourage the spouses to become economically independent from one another within some reasonable time. This section describes the economic situation of couples who separated or divorced just prior to the new divorce legislation. With respect at least to divorce, these data provide a baseline against which to measure the extent to which the support objectives of the Divorce Act, 1985 will have changed the standard of living of divorcing couples and their children in the future.

Relative Economic Levels

Depending on the comparison, most studies of male and female incomes have, over the past decade, found that, on average, women earn from about 58 per cent to 65 percent of male earnings.[77] As reported by clients in this study, mean incomes for separated men and women are $2075.00 and $1287.00 per month, for men and women, respectively. Divorced clients report a higher average monthly income of $2343.00 and $1506.00 for men and women. The net result

---

76 See for example, Ann Bottomley, "What is Happening to Family Law? A Feminist Critique of Conciliation", in Julia Brophy and Carl Smart (eds.), Women in Law, London: Routledge and Kegan Paul, 1985.

77 See, for example, Pat and Hugh Armstrong, The Double Ghetto, Toronto: McClelland and Stewart, 1983.

is that, relative to the men, women, in our sample have incomes quite close to what has been found nationally: 62 percent and 64 percent of male incomes. The distributions of incomes are shown in Table 5.1. These comparisons are based on the total sample of clients. However, when the data from the sub-sample of men and women previously married to one another are considered, averages and distributions of female and male income are very similar: women's incomes are, on average, about 64 percent of that of their former husbands.

Table 5.1
Percent Distribution of Men's and Women's Gross Monthly Income
(Client Interview Data)

	Percent Distribution			
	Divorced		Separated	
Income Category	Women	Men	Women	Men
Less than 1000	32.5	11.7	46.6	21.6
1000 to 1500	21.0	14.6	26.0	12.8
1501 to 2000	23.9	13.9	13.0	13.8
2001 to 2400	9.3	13.8	4.6	17.6
2401 to 3000	9.3	26.0	6.9	15.2
3001 and above	3.9	19.7	3.0	19.2

Economic Hardships

These comparisons include as income, for women, maintenance payments but do not reflect the effect of these payments on men's actual gross income. When maintenance is deducted from men's income, their average monthly income falls to $1970 per month for divorced men and to $1714 for separated men. On the assumption that men pay their maintenance, the general effect is to equalize, to some extent, the post-divorce or separation situation of men and women. When maintenance is taken into account, divorced women have incomes of about 75 percent and separated women have incomes of about 81 percent of male incomes. Clearly, these comparisons tell us nothing about relative standards of living since in the majority of cases, women have physical custody of the children and are, therefore, supporting two or more people on an income somewhat lower than what is supporting one person. In the following paragraphs the relative economic situation of separated and divorced men and women is considered taking into account the important variable of family size.

National Council of Welfare estimates for June, 1986 set the Canadian poverty levels (low income lines) as shown in Table 5.2. Looking at men's after maintenance income, some 9 percent

of divorced men and 30 per cent of separated men who do not have custody of their children have incomes which fall below the estimated poverty level for one-person households. In contrast, approximately 62 percent of women and their children live below the poverty line after including maintenance in their gross incomes and considering family size. While the numbers are small (N=46), 42 per cent of men with physical custody of their children were also found to have incomes which put them below the poverty line. As Table 5.3 shows, separated women are worse off than divorced women and, predictably, the larger the family the greater the likelihood it will be living below the estimated poverty lines.

Table 5.2

National Council of Welfare Estimates
of Low Income Lines for 1986
(Population of 100,00 - 499,99)

Family Size	Low Income Lines
1	10,108
2	13,365
3	17,850
4	20,628
5	23,948
6	26,101
7	28,792

Table 5.3
Proportion of Women and Children Living
Below the Poverty Line by Family Size
and Type of Case

Family Size	Divorced	Separated
2	43.4	47.4
3	55.7	75.9
4	61.7	96.0
5 or more	88.8	71.4
Total:	57.7	71.0

Reducing Economic Hardships

Lump Sum Payments

Before turning to the issue, of maintenance, it is useful to consider, briefly, the issue of lump sum payments. We use the word issue, because there is some controversy about the advantages and disadvantages of this kind of award. On the positive side is that a one-time payment may allow the couple to make a "clean break" and it provides greater security for women

and their children than when they must depend on the ongoing willingness of their former husband to comply with a maintenance order. On the negative side is that even when the lump sum payment is large, the actual annual income which it yields may be less than a court might have awarded in maintenance payments. Thus, over the long run, lump sum payments may work to the detriment of women and to the advantage of men.

Our data indicate that lump sum payments are ordered very rarely, in only about 5.1 percent of all cases. Nor are the amounts of very great magnitude. While the range is from just under $500.00 to $75,000.00, the average for these 64 cases is only $15064.00. If there is evidence that this approach was used as a form of "clean break", it lies in the fact that the average size of the payment is larger by $2862 for childless couples than for those where there are children ($17389 and $14527, respectively). There is no indication that lump sum payments were made in lieu of maintenance payments. It appears, rather, that virtually all of these orders also include an order for maintenance. Indeed, the average amount ordered is, at $639.00 per month, considerably higher than where no lump sum payment was involved ($351.00 per month). We turn, next, to consider various aspects of the much more common form of financial award, maintenance orders.

Maintenance Quantum

In designing the research, the initial intent was to separate out amounts awarded for child and spousal support. While an effort was made to code these data, the result is unsatisfactory because in a large number of awards, only the total amount of maintenance is indicated and in some awards it is unclear what was the intention. The following is, therefore, based on total amount of maintenance as recorded in the court records and as reported in the interviews.

The first thing to be noted is that in only 65 per cent of cases where there were one or more children in the marriage was an award made.[78] Terms, in these awards, were not specified in 55 per cent of cases (Table 5.4) and, in one-third of cases the amount was nominal, thereby making it possible to apply in the future. About 12 per cent of awards explicitly contained statements as to the intent or objective of the award. Of interest, too, is that only about 6 percent of awards were to be paid through the court.

---

78 While data were collected on childless divorce cases, these are excluded from all of the analyses in this Part of the report.

Table 5.4
Type of Maintenance Award

Type of Award	Percent
Not specified	55.5
Fixed Time	4.5
Until an event occurs	6.8
Rehabilitative	0.7
Leave to Apply	32.7

Client interview data indicate that while, in 65 per cent of cases there is a maintenance order, there is separate support for the wife in only 21.2 per cent of these awards. A majority of these (59.6 percent) were officially, or in the eyes of the respondents, for a specific period or until the wife was in the labour force or finished her training and so on.

Overall, combining spousal support and child support, the average maintenance quantum for divorce cases, as found in the court records, is $380 per month for divorce cases and about $250 per month for separation cases. Women fare somewhat better when the case is contested as opposed to uncontested: $426 and $345 per month respectively. Interestingly, women do worse when they are the petitioner ($359 per month) than when the husband is the petitioner ($417 per month).

Respondents interviewed in the client survey report a higher average level of maintenance received (or paid, in the case of men) than was found, generally, in the court records: $470 compared to $380, a difference of $90. In short, it is apparent that our interview data are not fully representative of those cases where very little maintenance was ordered by the court or agreed to by the parties, themselves. At the same time, it should be noted that the median and mode for both the case analysis data and the client interview data are the same and are about $300.00 per month.

Maintenance and Family Size

For women receiving support and who have physical custody of their children, mean family size is 3.02. That is, women have, on average, two children in their custody. However, amount of maintenance ordered by the court does not very adequately take into account the number of children to be supported by the award. As can be seen in Table 5.5, court records and client data indicate that while amounts awarded do rise with number of children, the larger the family, the less there is per child. Separate runs of mediation and non-mediation cases indicate that mediation has no positive or negative impact on the lot of children in larger families. Presumably, there is only so much

money to go around and there is little mediators can do to change that reality.

Table 5.5
Amount of Maintenance per Child and and Number of Children, Divorce and Separation Cases and in Total

No. of Children	Divorce Cases Per child	Separation Cases Per child	Total Per Child
One	354	278	311
Two	206	273	233
Three	176	129	164
Four	214	91	164

Maintenance and Income

As noted earlier, data from Weitzman's California study indicate an inverse relationship between husband's level of income and proportion of maintenance ordered by the court. That is, the higher the husband's income, the lower the proportion that is taken up by the maintenance award. Using net income, she finds, for example, that men with annual incomes under $10,000 were, on average, ordered to pay 37 per cent of their income as child support. In contrast, men with incomes over $50,000 were ordered to pay only 5 per cent of their income as child support and 19 per cent of their income as alimony and child support. As well, her data show that men are rarely ordered to pay more than one-third of their net income as maintenance. Other American data, based on gross income, suggests a similar pattern of regressive maintenance payments with the range being from about 20 per cent for low income men to about 10 per cent for men earning $30,000 or more per year.[79]

There is, in the Canadian data, a less clearcut relationship between husband's income and maintenance quantum. Overall, and combining divorce and separation cases, men were ordered or agreed to pay 18 per cent of their gross income as maintenance. While the range in proportions is from 31 per cent down to 16 per cent, the relationship is not so obviously an inverse one as was found in the United States (Table 5.6). Nor is there a very close relationship between divorced and separated men as to the percent of their income expended on maintenance.

---

79 Cited in Weitzman, p. 266.

Table 5.6
Proportion of Husbands' Gross Monthly Income Paid in Maintenance
(Client Interview Data)

Income Group	Divorce Cases	Separation Cases	Total
$600 or less	35	18	25
601 to 800	20	6	16
801 to 1000	23	21	22
1001 to 1200	16	23	17
1201 to 1500	20	16	19
1501 to 1800	23	13	19
1801 to 2000	15	14	15
2001 to 2400	17	17	17
2401 to 2800	16	21	17
2801 to 3000	21	31	22
3001 to 4000	18	20	19
4001 and above	19	10	20
Average, all groups:	18.7	17.5	18.2

There is a somewhat clearer relationship between amount of maintenance received and its contribution to women's total income. For both separated and divorced clients, about 40 percent of their income is derived from maintenance. Generally, and discounting some anomalies, the lower the income level, the greater the proportion which the maintenance award contributes to total income. Table 5.7 shows that the range is from 56 per cent for the lowest income group to 13.5 per cent for women earning over $3,000 per month.

Table 5.7
Proportion of Women's Total Monthly Income Derived from Maintenance Award
(Client Interview Data)

Proportion of Income from Maintenance

Income Group	Divorce Cases	Separation Cases	Total
under 600	73	45	56
600 to 800	35	60	44
801 to 1000	93	39	75
1001 to 1200	43	33	42
1201 to 1500	37	46	40
1501 to 1800	23	23	23
1801 to 2000	42	18	36
2001 to 2400	17	26	19
2401 to 2800	14	37	18
2801 to 3000	37	28	35
3001 to 4000	16	10	13
4001 and above	--	14	14
Average, all groups:	39.1	40.1	39.5

Maintenance and Standards of Living

Two well-known American studies have tried to determine the impact on men's and women's income, after divorce, if the amount of support ordered by the court was, in fact, paid. The first of these, by Chambers, found that after paying maintenance, about 80 per cent of men would still be living above the poverty line,[80] findings replicated in the Alberta study of matrimonial support.[81] In contrast, if women with physical custody of children depended solely on maintenance for their family income, 97 percent would be living below the poverty line or, as it is called in the United States, the "lower standard budget."

Using similar procedures and assumptions, Weitzman finds in California that after paying support, 73 per cent of men could live comfortably, that is above the lower standard budget, whereas only 7 per cent of women and children could live above the poverty line even if the support were paid in full. The general , of both studies is that under levels of support ordered by the courts, "it is only the women and children whose standards of living decline, even when the father is making his payments." [82] The reason, of course, is that men are generally required to pay about one-third of their net income as child support whereas women require about three-quarters of that income to continue to live at the standard before dissolution of the marriage.

Given what has just been described about size of average maintenance awards and the rather inconsistent relationship between size of award and number of children, it would be surprising if our data did not produce a similar picture for Canada. As noted, earlier, National Council of Welfare estimates for June, 1986, set the Canadian poverty lines at $10,108 for one-person households. For men ordered to pay maintenance, average gross income is $2,364 per month. When maintenance amount is deducted from this income, the average after maintenance income falls to $1,970 per month for divorced men and to $1714 per month for separated men. Thus, on average, men have annual gross earnings <u>after</u> paying maintenance of $13,532 and $10,460 over the poverty line for one-person household.

---

80 David Chambers, <u>Making Fathers Pay</u>, Chicago: University of Chicago Press, 1979.

81 Canadian Institute of Law Research and Law Reform, <u>Matrimonial Support Failure: Reasons, Profiles and Perceptions of Individuals Involved</u>, Edmonton: Institute of Law Research and Law Reform, 1981, p. 22.

82 Weitzman, p. 276.

Table 5.8 sets out the distribution of after- maintenance income for men. As there are substantial differences in distribution and average income for divorced men and separated men, these are shown separately. After paying maintenance, about 11 percent of divorced men and 28 percent of separated men have gross earnings which put them at, or below, the poverty line. Or, to put it another way, 89 percent of divorced men and 72 percent of separated men can afford to pay maintenance without falling below this estimate of poverty.

Table 5.8
Distribution of Male Income After Maintenance Award is Deducted for Divorced and Separated Men (Client Interview Data)

Income Group	Divorced (Percent)	Separated (Percent)
Under 10,000*	11	28
10,000 - 15,000	19	12
15,001 - 20,000	12	16
20,001 - 25,000	23	22
25,001 - 30,000	16	12
30,001 and above	19	12

* In 1986, the poverty line for single-person households was estimated at $10,108 for communities of size 100,000 to 499,999.

Similarly, our findings for divorced women closely approximate those found in the American research. Again, using National Council of Welfare estimates of poverty lines for various family sizes, our data indicate that 97 percent of women and children would be living below these poverty lines if they depended solely on maintenance awarded by the courts. Table 5.9 gives percentages for different family sizes. Here, there is little point in looking at divorced and separated women as separate groups since virtually all would have incomes below the relevant poverty lines if they depended solely on maintenance.

Table 5.9
Proportion of Women and Children Who Would be Living Below Poverty Lines When Maintenance is the Sole Source of Income

Family Size	Poverty Line	Percent
Size 2	13,365.00	97.9
Size 3	17,850.00	98.8
Size 4	20,628.00	96.8
Size 5	23,948.00	93.3
All groups		96.9

Actual Impact of Maintenance on Standards of Living

While useful for comparative purposes, one can question the rationale and assumptions underlying these kinds of analyses, since they make the implicit assumption that women are not in the labour force and are not contributing to the support of their children. Clearly, as we know, a majority of married women are working outside the home and there is every indication that this historical upward trend will continue in the future. There is, as well, the implicit assumption that men have the sole obligation to support their children and ex-spouse, whereas the philosophy underlying recent federal and most provincial legislation is that each spouse has an obligation to support his or her children according to ability and to support the former spouse, if that person is in need. Underlying the notion of rehabilitative maintenance for a spouse is the assumption that no adult is entitled to support simply as a result of having been married. However, the reality is that women earn, on average, less than men and, at the same time, are usually the primary caretakers of the children of the marriage. While women have an obligation to support themselves, the better question to ask is what impact present maintenance awards have on reducing economic hardship on women and children following divorce and separation.

One way to examine this is to consider what would be the situation of women and children if they did not receive maintenance and what is their situation when they do receive maintenance. Table 5.10 shows that, in total, maintenance reduces the number of women and children living below the poverty line from 75 per cent to 58 per cent, a difference of 17 per cent. It is where there are two or three children (family sizes 3 and 4) that maintenance payments have the most effect in reducing the number of families below the poverty line.

It is apparent that maintenance payments ordered by the court, or agreed to by the parties, in 1985 and early 1986 have only a marginal effect on mitigating the economic hardship of women and children following divorce. A frequently heard argument is that most men cannot afford to pay maintenance but this is not borne out in our data. As we have just seen, it is true for only about 11 per cent of divorcing men. Indeed, on average, these men could pay upwards of $10,000 to $13,000 more per year in maintenance without themselves falling below the poverty line for a one-person household. Of course, the reality is that most divorced men are not living in one-person households or will not be doing so for very long. While most men in our study had not been divorced or separated for more than about six months, about two-fifths (compared to one-quarter of women) were already "repartnered" and, of these, about 45 per cent either had a child from that relationship or were making a financial contribution to one or more children from their new partner's previous relationship.

Table 5.10
Percent of Women and Children Living Below the 1986 Poverty Line with and without Maintenance Payments by Family Size

Family Size	Divorce Cases Maintenance		Separation Cases Maintenance	
	Yes	No	Yes	No
One	43	54	47	46
Two	56	76	76	86
Three	62	77	96	97
Four	62	77	71	90
five	58	74	71	76

Too, averages tell us about the general not the specific; while it seems evident that men, repartnered or not, can and should be paying a larger proportion of their income in maintenance, before formulating a specific policy, it would be necessary to take into account a number of other factors -- family size, age of the children, the ex-spouses present and probable income -- and to do so on a case-by-case basis.

However, if, on average, men were to be required, uniformly, to pay one-third instead of, at present, less than one-fifth of their gross income in maintenance, women, in our sample would have an average income about $2580 above the 1986 poverty line and, taking family size into account, only about one-quarter (26 percent) instead of the present 58 percent of these families would be living below the poverty line. Again, on average, men in this study would still have gross income after maintenance of about $8800 above the poverty line for a single-person household. All of the proceding is, of course, premised on the assumption that men do comply with their maintenance orders and make their payments. The following paragraphs set out data relevant to this issue.

Compliance With Maintenance Orders

Research on enforcement of maintenance orders suggeests that there is a kind of gradual process of disengagement in which, over time, increasing proportions of men fail to comply with the maintenance order. Our interviews took place relatively shortly after the final settlement (though, in about one-fifth of divorce cases there was a previous order under provincial legislation or an interim order under the Divorce Act, 1968). The expectation, then, was that rates of compliance would be relatively high. Compared with the familiar statistic that 80 percent of men are in default on their maintenance orders, this is certainly the case. But, nevertheless, as can be seen in Table 5.11 only 71 percent of women were able to state that they always received the

full amount and only about half (51 percent) said that they received their payment on time. Similarly, some 36 percent defined the pattern of payment as irregular or varied and more than one-fifth of women were receiving no payments or less than the amount ordered by the court.

Men we interviewed report a more favourable picture as to their compliance with the maintenance order. Since comparisons of the matched data on ex-spouses show little or no difference between women and men, this does not seem to be an example of two different perceptions of the same objective situation. Rather, men we were able to contact and interview, do appear to be those who, at present, are, for the most part, living up to their support obligations.

Table 5.11
Patterns of Maintenance Payment
(Client Interview Study)

Amount Received/Paid	Women	Men
Full Amount	71%	88%
Usually full amount	6	4
Half to three-quarters	2	--
Less than half	3	--
No payments	18	7
Promptness of Payments		
Always on time	51%	77%
Usually on time	14	11
Within a week	6	4
Usually late	12	7
No payments	18	7
Payments Regular	Women	Men
Yes	64%	85%
No	29	9
Varies	7	6

Table 5.12 presents responses to questions concerning the durability of the original maintenance order. Overall, in about 59 percent of cases, maintenance quantum had not, at that point, changed from what was initially ordered. For the one-quarter where changes have occurred, about 30 percent are the result of an informal or formal escalation clause to take into account inflation. Formal variations were requested by either the wife or husband in about 27 percent of the cases where maintenance quantum has changed from the original order.

Finally, over one-quarter (27 percent) of women have attempted to enforce their maintenance order and another eight percent are planning to do so in the future. Nearly one-fifth of

men have been involved in a "show cause" hearing and 5 percent expect this to occur in the near future. Where an order was enforced, in one-third of cases, men were ordered to pay and about one fifth were varied downwards. While no men reported that their wages had been garnisheed, for 16 percent of women this was the outcome of enforcement. Here, the largest category is other (37 percent), a variety of outcomes too numerous to be coded adequately.

Table 5.12
Changes in Maintenance Quantum and Enforcement Intentions
(Client Interview Data)

	Women	Men
Change in Maintenance Quantum		
Higher	14%	21%
Lower	12	11
Same	57	61
No Payments	18	7
Reason for Change		
Inflation Agreement	32	28
Variation requested(ex-spouse)	13	18
Variation requested (self)	12	14
Informal Agreement	12	21
Other	32	19
Order Enforced		
Yes	27	19
No	65	75
In Future	8	5

Perceptions of Economic Consequences

During the course of our interviews, we asked a number of questions about people's assessment of the fairness and degree of satisfaction or dissatisfaction with the economic settlement involved in their divorce or separation. At the time the maintenance agreement was made, most women (77 percent) said that they were satisfied with the amount of maintenance agreed to by the parties or ordered by the court. Table 5.13 shows that people used a variety of routes to determine the maintenance quantum. We find little difference in degree of satisfaction between those who settled the matter in court or those who worked it out prior to going to court. By the time of the interview, however, some six months after final settlement, only about half (49 percent) of women remained satisfied with the amount of maintenance ordered. In contrast, 67 percent of men said that they were initially satisfied and at the time of the interview this had fallen to 52 percent. Distributions for mediation and

non-mediation cases is quite similar to what we have just described.

Table 5.13
How was Maintenance Quantum Determined
(Client Interview Data)

Method	Percent
By Court Hearing	29
Lawyer Negotiation	37
Mediation	5
Directly between spouses	21
Other	8

The preceding statistical analysis suggests that most women but few men would believe that their standards of living had fallen as a result of divorce and separation. However, Table 5.14 indicates that there are not dramatic differences between women's and men's perception of their present standards of living. Overall, more than two-fifths of men and women feel that they are worse off as a result of the marriage breakup. But, over 47 percent of women and 52 percent of men believe their standard of living has improved or remained pretty much the same. There is virtually no difference in perceptions between those who mediated their case and those who did not.

Table 5.14
Perceptions of Changes in Standards
of Living by Sex
(Client Interview Data)

	Percent	
	Women	Men
Worse	46	43
Same	18	27
Better	29	25
Other	7	6

The statistical data, just presented, give one kind of picture of the economic situation of people following divorce and separation. What people told us and how they qualified their answer to this question, offer a somewhat different perspective. For many of the women, "Standard of Living" was not entirely perceived and defined in economic terms. For those where alcoholism and/or violence had been precipitating or underlying factors in the marriage breakdown, a lower objective economic standard was frequently seen as an acceptable price to be free of the situation. Moreover, while, in theory, family income was higher before the separation, the reality was that much of this income did not make it into the home. Thus, as the following quotes illustrate, while poorer on paper, many women feel that

they now have predictability in their lives and control of what financial resources are available to them.

> " We had more money but also more bills. Before he'd spend all the money on booze. Now, it's no fun living on welfare but at least I have only myself to fall back on. There are different stresses."
>
> "I'm financially stable now. I know how much I'm getting and how long it has to last me. I'm in control of the finances. As long as I have enough to live on that's good enough for me now."
>
> "Financially things work out. While I was married I had to depend on my husband for spending money and grocery money..-.and he was spending approximately $500/mo. on liquor. I'm better off by myself."
>
> "It's a lot lower in some ways. It takes longer to get things. But there's more independence in deciding where money is going to be spent. I decide the priorities."
>
> "Financially things are tighter. But otherwise, there is less strain so it's better."
>
> "Now I'm living in an apartment. I used to live in a house. We used to travel, now I don't. I used to afford more clothes. But I'm happy this way--I've made the choice."
>
> "I feel much more independent and in control even though I don't have as much to spend as before."
>
> "He was drinking all the time. We hardly had money for groceries. We had to eat at my Mom's for two weeks. He was a terrible money manager. Now I can budget and spend it where I need to."

Some of the men expressed similar sentiments. A minority had also been caught up in relationships where, apparently, there had been various forms of financial irresponsibility on the part of their ex-spouse. These men, while objectively poorer, felt considerable relief that they now had control of their incomes. As with women we interviewed, there were men who also felt that the diminished standard of living they were presently experiencing was an acceptable price to pay in order to be free of an emotionally intolerable situation. Too, at the time of the interview, some men who said that their standard of living was lower noted that they were still paying off debts--Mastercard, Visa etc--incurred during the marriage. They could see a better financial situation for themselves in the not too distant future. And, finally, while it is certainly true that, on average, men we

interviewed appeared to have considerably more disposable income than their ex-spouses, many felt poorer because they had given up their home and furnishings to their ex-wife and children and were, in effect, starting over in much reduced physical surroundings.[83]

THE IMPACT OF DIVORCE MEDIATION

The preceding pages have presented some aspects of the economic situation of men and women following divorce or separation. In the remainder of this section, we turn to the central question of whether mediation has any effect on the amount of maintenance paid and the patterns of maintenance payment. Of particular interest is whether, when maintenance is one of the issues subject to mediation, are outcomes different than when it is not. To put it more concretely, do women and children fare better in Montreal where all four issues are mediated than in Saskatoon and St. John's where only custody and access are, potentially, settled through mediation.

One confounding factor is that the research sites differ not only in size but also in level of affluence. Table 5.15 shows the not too surprising finding that, of the four research sites, St. John's clients report the lowest average monthly incomes though Saskatoon clients are also less affluent than their counterparts in central Canada. This is reflected in the amount of maintenance per month (Table 5.16). In Montreal, as the mode (the most common value) indicates, average maintenance is "pulled" upwards by there being an essentially bi-modal distribution of maintenance awards. And, in Ottawa, awards were so varied as to make a modal value rather meaningless. As well, the proportion of male income awarded as maintenance also varies between jurisdictions: 16.5 percent in St John's, 17.4 percent in Saskatoon, 18.2 percent in Ottawa and 21.0 percent in Montreal.[84]

---

83 Having said that, it should be noted that divorced men are somewhat more likely than divorced women to be living in their own home rather than renting: 47 percent versus 35 percent. This remains the case when matched ex-spouses are considered.

84 Ottawa has been included for interest sake. However, since we were not concerned with mediation in this research site it is omitted from the following comparisons.

Table 5.15
Average Monthly Income by Research Site and Sex

Research Site	Mean Income	
	Women	Men
Montreal	$1607	$2512
Saskatoon	1283	2208
St. John's	1204	1486
Ottawa	1715	2411

Table 5.16
Amount of Maintenance Per Month by Research Site

Research Site	Average	Median	Mode
Montreal	534	390	300 (600)
Saskatoon	519	300	300
St. John's	273	190	300 (200)
Ottawa	549	400	---

In general, the data reveal that average maintenance quantum is greater for mediated than non-mediated cases. According to court records, the average amount of maintenance for mediation cases is $430 per month and for non-mediated cases the average amount is $332, a difference of $98 per month. Clients who mediated their case report average maintenance at $543 per month compared to $428 per month for those who did not mediate their case, a difference of $114 per month. Assuming that maintenance is paid, mediation has the general impact of increasing the income level of women and children by about $1200 to $1400 per year. To put it another way, maintenance amounts are, in general, about 22 percent higher when the case is mediated than when it is not.

We start with these overall comparisons because they do demonstrate that mediation has a positive impact on reducing economic hardship of women and children following marriage breakdown. Admittedly, the differences are not great. These findings do, however, undermine the argument that women fare worse when their divorce or separation is mediated. One possible explanation of these findings is that observed differences are a result not of mediation but of differences in level of affluence between those who use mediation and those who do not. Indeed, as was described in Part IV, mediation clients are somewhat better off than the general population of divorcing and separating couples. However, when income is controlled, as in Table 5.17, the differences persist: at the three income levels chosen, amount of maintenance is from 12 to 20 percent higher for mediation cases than for non-mediation cases. Finer breakdowns of income data do not change this general picture.

Table 5.17
Average Monthly Maintenance for Mediation and Non-mediation Cases for Various Income Levels

Income Category	Type of Case		% Difference
	Mediation	Non-mediation	
Low	$401	$341	15
Medium	446	358	20
High	566	500	12

Low = $900 per month or less; Medium = $1100 to 1900; High = above 1900.

Further analysis of the data suggests that these apparent differences in maintenance mask a considerable amount of variation as we move between women and men, separated and divorced couples, sex of petitioner and research site. Undoubtedly, there are further ways that these data could be broken down, but the following analyses will, perhaps, suffice to show that both proponents and opponents of mediation have some grounds for their contentions.

The first thing to be noted is that, when divorce and separation cases are viewed separately, mediation has a much greater impact on separating than divorcing couples. Data from the court records indicate that maintenance quanta are, on average, 19 percent higher in divorce cases and 40 percent higher for separation cases when clients mediated their settlement. There are even larger differences when women are the petitioners to the divorce or separation and they mediate their case: 33 percent and 55 percent for divorce and separation cases, respectively.

Complicating matters is that when we turn to client reports of maintenance received or paid, we have what are essentially countervailing sets of results which almost cancel one another out. Thus, at two of the three income levels we have chosen, maintenance awards are somewhat higher for those divorced couples who did not attend mediation than they are for those who did mediate their settlement (Table 5.18). Differences are not great and average out at about 9 percent. In contrast, for separation cases, mediation, at all three income levels has a sizeable impact on amount of maintenance: an average difference of approximately 40 percent.

Table 5.18
Average Monthly Maintenance for Mediation and Non-mediation Cases by Type of Case and Level of Income

Type of Case	Level of Income		
	Low	Medium	High
Divorce			
Mediation	359	456	484
Non-mediation	467	436	535
Separation			
Mediation	440	473	658
Non-mediation	184	260	517

The different impact of mediation on amount of maintenance is an unexpected finding and we have devoted considerable computer time to further analysis of these data. At this point, we are unable to offer an adequate explanation. One possibility considered was the nature of legal representation in the two types of cases. That is, while virtually all (98 percent) of those petitioning for divorce had legal representation only about two-thirds of petitioners using provincial legislation were so represented. There is, then, the possibility that those who did not mediate their case were also without legal representation and were, in effect, doubly damned. However, this is not borne out by the data; there are only small and insignificant differences in the likelihood of having legal representation and type of legal representation (private lawyer,legal aid lawyer and self-representation) between mediation and non-mediation clients. And, when type of legal representation is held constant, the same patterns with respect to average maintenance just seen in Table 5.20 persist. In other words, we report these data and the differences between separation and divorce cases but we cannot, at this point, explain them.

Comparisons Between Sites

As described earlier, the highest amounts of maintenance are in Ottawa and Montreal. In two of the three mediation research sites, maintenance quanta are higher for mediated cases than non-mediated cases. In Montreal and Saskatoon there is a difference of 28 percent and 11 percent respectively between mediated and non-mediated cases. However, in St. John's, mediated cases show an amount of maintenance which is about 4.5 percent lower for mediation than non-mediation cases. In other words, our data suggest that, from the point of view of women and their children, there are merits in including maintenance as one of the issues which should be mediated.

Here we might add that one of the complaints of clients we interviewed in Saskatoon and St. John's was that maintenance, seen often as the most contentious issue, was not discussed by the mediators. Nor, as mentioned in Part IV, do there seem any longer to be reasons for excluding this issue; a majority of lawyers we surveyed, while drawing the line at mediation of property division, seem to feel that maintenance ought to be settled along with custody and access. Indeed, as the description of the Montreal mediation service suggests, it is unclear how a couple can reach a decision about custody and access without, at the same time, working out a maintenance agreement. It is, nevertheless, of interest to consider the impact of mediation on reducing economic hardship following marriage breakdown.

As Table 5.19 indicates, mediation has its greatest impact for women who separated rather than divorced. While separated men who attended mediation pay more per month than those who did not, the group of women we were able to interview are more than 50 percent better off than their counterparts who were unable to attend mediation or who were uninterested in doing so. Divorcing men who attended mediation agreed or were required to pay an average of 20 percent of their income in maintenance compared to 18.1 percent for those who did not attend mediation. In contrast, there is a larger difference for separated men: 20.8 percent and 15.6 percent, respectively for mediation and non-mediation cases. In turn, for divorced women, 37 percent and 41 percent of their total income is derived from maintenance. However, the most dramatic differences are for separated women; those who attended mediation report that 53 percent of their income comes from maintenance compared to 27 percent for those who did not mediate their settlement.

Table 5.19
Average Monthly Maintenance Received or Paid
for Mediation and Non-mediation Cases by Sex and Type of Case
(Client Interview Data)

	Mediation	Non-Mediation	Difference
Divorce Cases			
Women	$440	$497	-57
Men	427	448	-21
Separation Cases			
Women	577	273	+304
Men	476	383	+ 93

Impact of Mediation on Reducing Economic Hardship

It is apparent, then, that mediation has a fairly major impact on the income of separating women and some impact on the situation of divorced women. However, when both groups are combined, there is only a small difference between mediation and non-mediation cases and the likelihood that women and their children will be living below the poverty lines set out earlier in Table 5.2 is quite similar. The overall difference of 4.4 percent shown in Table 5.20 is not sufficiently substantial for one to draw s one way or another about the impact of divorce mediation with respect to the objective of reducing economic hardship. There seems no doubt that, in general, women fare better through mediation. But, the differences in maintenance amounts, though no doubt important to the well-being of these families, are not large enough to change the generally impoverished situations of women and their children following divorce and separation.

Table 5.20
Proportion of Women With Incomes Below the Poverty Lines for Various Family Sizes for Mediation and Non-Mediation Cases

Family Size	Percent Below Poverty Lines	
	Mediation	Non-Mediation
Two	41.5	46.6
Three	69.1	57.7
Four	77.8	71.1
Five	82.4	84.8
Total:	64.7	60.2

Throughout this section, we have been concerned with the economic fate of women and their children after divorce or separation. As we have seen, if men were to pay a larger share of their gross income in maintenance than is now typically the case, the number of families which presently exist below the poverty lines for various family sizes could probably be halved. And, this could occur without drastically impoverishing men in the process. All of this has been presented with some degree of ambivalence. While, at the collective level, we can only be aghast at the difference in standards of living between men and women following divorce or separation, it is not at all clear that divorcing and separating men should, on an individual basis, be forced to mitigate or redress the structured inequalities between men's and women's incomes which are built into our society. Nor does it seem reasonable to assume that mediators should, somehow, overcome the existing policies in the courts with respect to amount of maintenance which is typically ordered.

In other words, the case for mediation should not rise or fall on the basis of whether this approach does or does not redress the broader inequalities built into our society.

Mediation and Compliance with Maintenance Orders

It was noted earlier that, with respect to compliance with maintenance orders, most of those interviewed have not been put to the test: they have not been divorced or separated long enough for us to expect to find default rates at the level reported in earlier studies. Table 5.12 described the general patterns of maintenance payments and Table 5.13 provided some indication of present and past levels of satisfaction with the amount of maintenance being received and paid. There is little we can add here: percent distributions shown in those tables for men and women do not change when we consider mediation and non-mediation cases separately. The only to be drawn is that, as reported by clients, there is virtually no difference between mediated settlements and non-mediated settlements in terms of compliance with maintenance orders and regularity of payments and general levels of satisfaction with the amount agreed to or ordered.

At the same time, it might be noted that where maintenance amounts have changed from what was originally agreed to or ordered, non-mediation clients are somewhat more likely than mediation clients to report that the amount has moved upwards (16 percent compared to 11 percent for women and 24 percent and 16 percent for men). Where a change has occurred -- in about one - third of all cases, both men and women who mediated their case are twice as likely as non-mediation clients to report that this was a result of either a formal or informal request for variation of the order. Only about 15 percent of mediation clients stated that the change was a result of an inflation clause built into their agreement compared to about 36 percent of non-mediation clients. While there are no differences among women in the proportions who have or intend to enforce the order, 26 percent of men who mediated their settlement have had the order enforced compared to 16 percent of the non-mediation group of men. Finally, while only two-fifths of women in the mediation group (compared to about half of those in the non-mediation group) feel that they are financially worse off, 57 percent of men in the mediation group stated that they are worse off (compared to 34 percent of those in the non-mediation group).

Mediation and Durability of Settlements

One of the expectations of mediation is that it will result in longer lasting settlements which will not require the parties to return to court for variation or enforcement of orders. As mentioned in Part II, it was only in Montreal that there were sufficient cases from our sample for us to undertake any kind of statistical analysis. As the following statistics suggest, the

Mediation service in the Montreal court appears to be highly successful in producing settlements which mitigate the need for people to return to the court.

At the time of our monitoring of cases in the Montreal court (February, 1987) only 72 couples, just slightly over 18 percent of the total sample, had returned to court to vary or enforce an order or to seek different measures under different legislation. Virtually all of these, 70 couples (97 percent) were non-mediation cases. Whereas about 20 percent of non-mediation cases returned to the court, only 4 percent of mediation cases had done so. And, it should be noted that one of these was in fact, a post-divorce mediation case in which the couple had been divorced a long time before attending mediation.

Here it is relevant also to note that while overall, we find little difference in client reports as to maintenance patterns, in Montreal, there are substantial differences between those in the mediation group and those in the non-mediation group. For example, 97 percent of women who mediated their settlement indicate that their maintenance payments are regular compared to 66 percent of those in the non-mediation group. And 85 percent compared to 73 percent said that the payments are either always or usually on time. Similarly, while two-fifths of women have or intend to enforce their maintenance order, this is true for less than 18 percent of women in the mediation group.

CUSTODY AND ACCESS

General Patterns of Custody

The analysis of Central Registry Data by Statistics Canada researchers [85] reveals a rather consistent and now well-known pattern of custody awards for the 1970's. While there are minor provincial variations, their data indicate that women receive custody in 85.6 percent of cases. Moreover, when women are the petitioners in the divorce, men are virtually excluded from obtaining legal custody; only about 4 percent of men were awarded custody under these circumstances. However, as they also show, when men are the petitioners (about one-third of all petitions) they have a much greater likelihood of being awarded custody (43 percent of cases). On the face of it, then, as the authors of the Statistics Canada report conclude, it seems that men wishing custody of their children would be well-advised to place themselves in the role of petitioner. At the same time, as will be discussed below, this may be something of a simplification since it is not at all clear that when men are petitioners, the circumstances or situation of the two parents are the same as when women act as petitioners.

---

85 Statistics Canada, Divorce : Law and the Family in Canada.

Our more recent data suggest that, while the basic patterns of custody decisions remain similar to these earlier data, we also can observe a number of changes in at least the four jurisdictions where information was collected. First, the proportion of divorce petitions initiated by women has fallen from 66 percent to 61 percent.[86] In addition, Table 5.21 shows that women receive sole custody less often than in the past (76.6 percent compared to 85.6 percent).

Table 5.21
Distribution of Legal Custody Awards

Legal Custody Award	Percent
To Wife	76.6
To Husband	9.5
Joint Legal Custody	8.8
Split Custody	4.4
Other	0.4

Part of the difference between the present data and those for 1979 is that, for purposes of clarity, Statistics Canada researchers excluded awards where it was not clear that custody had been awarded solely to one parent. In Table 5.22, we exclude joint custody and split custody awards. The major difference between the 1979 and 1985 data is that men, as petitioners, receive sole custody much less frequently than was the case in the 1970's (21.7 percent compared to 42.6 percent). However, where women are the petitioners, the differences are negligible, a decline of about 1.5 percent.

Table 5.22
Spouse Receiving Sole Custody by Sex of Petitioner

Sex of Petitioner	Spouse Receiving Sole Custody	
	Wife	Husband
Wife	94.2	5.8
Husband	78.3	21.7

An obvious question is what has happened when men are the petitioners to reduce their chances of receiving sole custody. The answer seems to lie in the greater tendency of the courts to make or agree to, joint custody awards, particularly where men have taken on the role of petitioner and have either contested custody or, at least, shown some interest in doing so. Further, our data show a slightly higher proportion of cases where a split

---

86 Where an action was initiated under provincial legislation, women were the initiating party in 81 per cent of all cases. No doubt this is because it is mainly women who approach the court, usually seeking maintenance for their children and, in some cases, themselves.

custody or, at least, shown some interest in doing so. Further, our data show a slightly higher proportion of cases where a split custody award was made (See Table 5.23).[87] None of this is meant to suggest that judges are imposing joint custody as a way to resolve custody disputes. Rather, it appears that where there is some desire on the part of the father for custody, both lawyers and mediators and, evidently, the couples themselves, are more likely to opt for joint custody than seems to have been the case in the past.

Table 5.23
Custody Outcome by Sex of Petitioner

Outcome	Sex of Petitioner	
Sole Custody to:	Wife	Husband
Wife as petitioner	83.3	--
Wife as respondent	--	63.8
Husband as petitioner	--	17.9
Husband as respondent	5.1	--
Joint legal custody	8.0	10.5
Split custody	2.9	7.4
Other	0.8	0.4

Disputed Custody

Prior to the Divorce Act, 1985, it was necessary that one party to the divorce action act in the role of the petitioner. Yet, as various commentators have noted, this was often a legal convenience having little or no relationship to the actual circumstances surrounding the breakup of the marriage. Nor can we assume, as is more or less implied in the Statistics Canada study, that when men petition for divorce, they are, at the same time, requesting custody or, for that matter that there was serious dispute about this matter.

---

87 It appears that the concept of split custody has, in practice, if not in strict legal usage, two meanings. As both Bala and Clarke (1981: 61) and Bissett-Johnson and Day (1986: 48) use the term, it refers to the very rare situation where legal custody is vested in one parent and care and control is given to the other parent. At the same time, the Statistics Canada report on divorce (1983: 205) uses the term to refer to situations where the children themselves are separated in such a way that each parent has sole custody of one or more but not all of the children. In our sample there were no split orders of the first kind. Hence, in referring to split custody, we have in mind the second kind of award.

Court records show that custody was initially in dispute in only 27.5 percent of divorce cases and in 46.5 percent of cases categorized as contested, figures borne out by what men and women told us in the course of the interviews. However, by the time of the court hearing, only 15 percent of cases initially disputed had to be settled in court.[88] The rest were resolved in a variety of ways prior to the court hearing (Table 5.24). While the proportions shown in this table for court hearings and custody hearings are quite accurate, distinctions between personal negotiation, on the one hand, and lawyer negotiation or mediation on the other hand, should be viewed with some caution. As we learned, some clients who claimed to have worked out custody and other matters on their own had actually attended mediation and developed out of these sessions a separation agreement. While troublesome for mediators wishing to show favorable statistics on outcomes, such cases do demonstrate the effectiveness of mediation approaches which leave clients feeling that they, rather than the mediator, are the author of the agreement. And, it is likely that here, too, clients underestimate the role their lawyers played in bringing about a settlement.

Table 5.24
Resolution of Custody Disputes

Method	Percent
Negotiation between parties	44.4
Negotiation between lawyers	16.0
Mediation	6.6
Custody Investigation	4.4
Court Hearing	14.9
Other	13.8

It is evident, then, that in about three-quarters of divorce cases, who was to receive custody was not at issue; the assumption is that women will receive custody of the children. And, in the majority of cases where custody was at some point in dispute, few were prepared to fight the issue in court. It is, nevertheless, of interest, to know the outcomes and subsequent perceptions of the small group of men for whom custody was at least initially viewed as a contestable issue. We begin by looking, generally, at outcomes of all cases where there was an indication in the court records that custody was to be contested

---

88 If we use as the base, all divorce cases where there are dependent children involved, 7.9 per cent were settled by a court hearing and 2.3 per cent by a custody investigation. In other words, about 10 per cent of divorce cases involving children require some level of court action beyond simply approving what the couple have agreed to beforehand.

by either the wife or husband. Table 5.25 suggests that where custody is disputed, men were about twice as likely to be awarded sole custody than where there is no dispute. If joint legal custody (which can also mean shared parenting) and split custody are also included, custody disputes result in 41 percent, as opposed to 20 percent, of men having a continuing legal attachment to all or some of their children.

Table 5.25 does not distinguish between sex of petitioner in those cases where custody was, at some point, disputed. Table 5.29 provides some further data for men as petitioners where custody was at issue. Again, under these circumstances,women are less likely to receive sole custody. Men, on the other hand, fare better as petitioners contesting custody, 17 percent compared to 7 percent (see Table 5.26). And, overall, about 46 percent of these men retain a legal attachment to their children.

Table 5.25
Outcomes when Custody is Initially Disputed

Type of Award	Custody Disputed	
	Yes	No
Sole Custody to:		
Wife as Petitioner	39%	57%
Wife as Respondent	20	23
Type of Award	**Custody Disputed**	
	Yes	No
Husband as Petitioner	7	5
Husband as Respondent	8	2.5
Joint Legal Custody	17	8.5
Split Custody	9	4

Table 5.26
Custody Decisions Where Custody is Disputed and Husband is Petitioner

Type of Award	Custody Disputed	
	Yes	No
To Wife	53.7	70.4
To Husband	17.1	13.0
Joint Legal Custody	17.1	9.6
Split Custody	12.2	7.0

Finally, Table 5.27 outlines data on outcomes by various methods of reaching a settlement (the "other" category for method of resolution is excluded from this table). When custody is not disputed, women receive custody in 79 percent of cases. Where the matter was, at some point, disputed or formally contested, women are less likely to be awarded custody. Men, in turn, are most likely to receive sole legal custody when the case is

actually litigated in court (26.2 percent). This seems to be mainly a result of the apparent unwillingness of Canadian courts to impose a joint custody order where the parties cannot reach a prior agreement.[89] Too, while the numbers become small, separate analysis of cases where men are the petitioners and the matter of custody is settled in court or there is a custody investigation suggest that men, under these circumstances, are awarded custody in 40 percent and 18 percent of cases, respectively.

In sum, the various analyses and breakdowns just presented, all point to the fact that when men are petitioners or, at some level, dispute custody, they have a somewhat better likelihood of being awarded custody. It should, however, be stressed that our data do not replicate the American findings that when men contest custody, they have a better than even chance of succeeding. Rather, the dominant outcome seems to be a greater likelihood that, if the dispute is settled prior to the court hearing, there will be a joint legal custody arrangement or a split custody order.

Table 5.27
Custody Outcomes by Method of Resolving the Dispute

Method of Resolution	Type of Custody Award				
	Wife	Husband	Joint	Split	Number
Negotiation between Parties	59.5	8.5	21.6	10.5	(153)
Negotiation between Lawyers	67.9	7.6	13.2	11.3	(53)
Mediation	32.6	2.3	65.1	--	(43)
Custody Investigation	68.4	10.5	10.5	10.5	(19)
Court Hearing	68.9	26.2	4.9	--	(61)
Not Disputed	79.2	4.2	14.4	2.2	(361)

Mediation and Patterns of Custody

In the context of this report, one of the more interesting findings shown in Table 5.31 is that when couples resolve the matter of custody through mediation, the outcome in 65 percent of cases is joint legal custody. However, more detailed analyses suggest that this is something of an exaggeration of the overall impact of mediation on custody outcomes. Here, people explicitly identified mediation as the method of resolving a dispute. And, these global figures also reflect the much greater tendency of mediators in the Montreal court to encourage couples to work out a joint custody arrangement.

---

89 This is discussed in some detail in Bisset-Johnson and Day, 1986, pp. 49-53.

Nevertheless, data from the court records and client interviews both suggest that, whether or not custody was in dispute, those who attend mediation are about four times as likely to opt for joint legal custody than are those who used a purely legal process. Thus, Table 5.28, based on court records, indicates that sole custody to the mother is much less likely where the case is mediated. Men do not necessarily do "better" through mediation but the outcome is more likely to be one in which they have at least a legal involvement with their children.

Table 5.28
Type of Legal Custody Decision for Mediation and Non-mediation Cases
(Case Analysis Data)

Type of Award	Case Type	
	Mediation	Non-Mediation
Sole Custody to:		
Wife	54.7	79.4
Husband	10.5	9.6
Joint Custody	28.4	6.5
Split Custody	5.3	3.9
Other	1.1	0.7

As noted, results are somewhat distorted by the greater number of mediation cases in Montreal and the preference of mediators there for joint legal custody and shared parenting, in general. Table 5.29 indicates that about 47 percent of mediated cases in Montreal result in joint custody. The figure is considerably lower in the other research sites. For sake of comparison, total distribution of awards is shown for Ottawa as well as the three mediation research sites. Of some interest is that about 15 percent of awards in Ottawa are joint custody awards, higher, in fact, than in Montreal.

Table 5.29
Custody Outcomes for Mediation and Non-Mediation Cases by Research Site
(Case Analysis Data)

Research Site	Type of Award			
	Wife	Husband	Joint	Split
Montreal:	74.0	11.5	10.7	3.8
Mediation	37.8	11.1	46.7	4.4
Non-mediation	79.5	11.6	5.3	3.3
Saskatoon:	77.7	10.7	6.4	3.7
Mediation	77.7	11.1	7.4	3.7
Non-Mediation	86.1	10.5	3.4	--
St. John's:	84.5	6.9	3.7	3.7
Mediation	75.0	10.0	15.0	--
Non-mediation	86.4	6.5	2.4	3.7
Ottawa:	70.9	7.8	14.9	5.7

The preceding analysis has relied mainly on court records because the sample of clients, both mediation and non-mediation, tends, on the whole, to overrepresent couples with a joint custody arrangement. This is understandable since there was a greater likelihood that those with joint custody awards wil both have remained in the same jurisdiction and, perhaps, are more willing to be interviewed. Table 5.30 shows the patterns of custody for the clients interviewed in this study. It goes beyond the scope of this report to consider these joint custody arrangements in detail except to note that about 43 percent of men and 49 percent of women interviewed, indicated that the award of joint legal custody also meant joint physical custody. Actual arrangements are shown in Table 5.31. It can be further noted that for 62 percent of women and 65 percent of men, joint custody was their first choice. Those who mediated their divorce or separation are somewhat more likely to indicate that joint custody was their first choice than are those who used a purely legal process (69 percent compared to 60 percent of men and 64 percent compared to 58 percent of women). And, finally, if they had it to do over, 89 percent of men and 75 percent of women would choose joint custody again. There is no difference between the mediation and non-mediation cases with respect to this question.

Table 5.30
Custody Outcomes for Mediation and Non-Mediation Cases by Research Site
(Client Interview Data)

Research Site	Type of Award			
	Wife	Husband	Joint	Other
Montreal:	56.8	9.6	31.0	2.6
Mediation	40.0	5.5	53.6	0.9
Non-mediation	78.8	7.5	10.1	4.2
Saskatoon:	71.7	8.7	11.6	8.0
Mediation	63.8	10.0	18.5	7.7
Non-Mediation	78.8	7.5	5.5	8.2
St. John's:	84.8	4.3	4.9	6.1
Mediation	81.7	3.3	10.0	5.0
Non-mediation	86.5	4.8	1.9	6.7
Ottawa:	69.8	7.6	18.1	4.5

Table 5.31
Physical Arrangements of Joint Legal Custody Cases by Mediation and Non-mediation (Client Interview Data)

Physical Arrangements	Type of Case	
	Mediation	Non-mediation
Half and half	43.2	51.1
Mother weekdays/ Father weekends	9.5	13.3
Physical custody to Mother	21.1	13.3
Other	26.3	22.2

In Part II, it was noted that one of the concerns about family law reform and divorce mediation is that, under pressure from Father's Rights groups, women are being forced into joint custody arrangements against their will. The argument is that they accept these because of the fear that, should their ex-spouse fight for custody, he has a good chance of winning. There is no doubt that mediators encourage couples to enter into joint custody arrangements. But, it must be stressed, our data --both quantitative and qualitative -- do not, in any way, suggest that women (or men for that matter) felt compelled to accept this kind of order. Most preferred a joint custody arrangement because they felt it was in the best interests of the children. And, after living with such arrangements for a time, most cited advantages rather than disadvantages of joint legal and physical custody.[90]

Attitudes About Custody

It is important to note that we do not find in our data evidence that custody was a particularly vexing or contentious issue. Father's Rights groups have, it seems, managed to convey an image of the embittered father denied custody of his children because of a legal system which is biased in favour of women. Certainly, the author, in the course of this research, has encountered men, who having lost a custody battle, carry on a personal crusade, often monitoring every behaviour and relationship of their ex-spouse in the hope of finding evidence to overturn the previous decision. And, in C. Wright Mills'

---

90 It is anticipated that a more detailed analysis of the joint custody arrangements in the sample will appear in a subsequent publication.

famous phrase, some of these men have turned a "private trouble" into a "public issue" and have created a new movement.[91]

In developing our interview schedule, we attempted to be particularly sensitive to issues of custody and, as well as asking a number of specific questions tried to leave open opportunities for men, in particular, to voice their concerns. And, of course, much of the analysis in this section has been concerned with the circumstances under which men, divorcing or separating under the previous legislation, were or were not likely to receive custody of their children. Taken at face value, the preceding statistics do reinforce the contention that the "cards have been stacked against men", that even when they do evince interest in having custody of their children, their chances are not good.

But, for several reasons, these statistics need to be interpreted with a fair degree of caution. First, we are unable to find many cases where custody was actually seriously contested. Although some men did, initially, raise the question of custody, our sense from the interviews is that for many men this was a rather half-hearted notion or, in a few instances, the result of vindictiveness, impressions borne out by the statistics on how few custody cases actually were resolved by a court hearing and/or a custody investigation. Indeed, it appears that in the vast majority of cases where men did receive sole custody of the children, this was not the result of a hotly contested battle but by default. As we learned, men received custody either because the mother did not want the children or for a variety of reasons was incapable of parenting. This is not to suggest that many of the men we interviewed did not miss their children, but we were also surprised that the vast majority felt that, whatever else was wrong with the ex-spouse, she was a good mother and that the children were best off living with her. In short, most men, it seems, snare the prevailing attitudes about the supposed superior nurturing ability of women or, at least, feel incompetent, themselves to take on the role of full-time parent. At the same time, when asked how they felt about the custody award, some 30 percent of men said that they were, to some degree, dissatisfied with the outcome when the result was sole custody to the mother. In contrast, 100 percent and 85 percent, respectively were satisfied when the award was in their favour or there was a joint custody award.

---

91 C. Wright Mills, The Sociological Imagination, New York: Oxford University Press, 1959.

Access Arrangements and Orders

As we learned over the course of this study, while custody may not be quite the burning issue as it is often portrayed, lawyers, mediators, judges and, sometimes, clients themselves, are in agreement that access is almost invariably contentious and tends to remain so long after the final settlement. If there is one role for court-based counselling and mediation services, it is in working out viable and realistic arrangements which both ensure the non-custodial parent continuing contact with his or her children, which allow the custodial parent some time free of parental responsibility and which also respect the right of that parent to organize his or her life and that of the children in a predictable fashion. As we learned, access, in many instances, involves an ongoing set of problems which sometimes requires the help of mediators and counsellors. For example, many of those we interviewed, while having few problems working out custody, maintenance and property expressed a need for post-divorce/post - separation counselling with respect to access. This was especially so among the small group of people who were attempting a joint custody and shared parenting arrangement.

It is unclear which of these issues is the larger problem. Certainly, lately, we have heard most about men who claim that they are denied access to their children. But, as our data suggests, from women's point of view, the major problem is that men do not always exercise their access rights or do so erratically and unpredictably. In the former case, women are left in the full-time role of single parent and are often, understandably, concerned about the impact father absence has on the children. In the latter case, there is the obvious inconvenience of not being able to plan one's time around the expectation that the children will be with their father. And, children face the prospect of disappointment and confusion when agreed upon arrangements are changed without warning.

From the point of view of the court, there is the vexatious problem that while compliance with maintenance orders and right to access are separate matters, they are seldom seen this way by those involved in such disputes. As Bissett-Johnson and Day, put it, "Withholding access appears to be a mother's weapon and withholding support, a father's."[92] The courts, despite repeated remonstrations to those involved in "show cause" hearings, seem

---

92 Bisset-Johnson and Day, 1986, p.55.

unable to dispel this connection.[93] In the following paragraphs and tables we outline, briefly, the nature of access orders and arrangements and then consider, in general, how, from the couples' perpsective, these are working out in practice.

Where sole custody is granted to one parent, Canadian courts almost invariably grant some form of access or visitation rights to the non-custodial parent. This seems to be the case even where there is a history of violence and/or insanity.[94] Where there has been considerable conflict about either acess or custody, it is not unusual to find orders--often agreements developed in mediation -- along the following lines:

> Peter will have the children, Mary and James every other weekend from 5:00 p.m. on Friday until 5:00 p.m. on Sunday. He will also have the children for one week during his annual vacation provided that he give at least two weeks notice to Elizabeth, the mother of the children as to when he will be taking his vacation. He will also have the children from 5:00 p.m. on Christams Eve until 12:00 noon on Christmas Day and on alternate birthdays of Mary and James.

As Table 5.32 shows, such arrangements comprise a minority of all access orders, occurring in about 23 percent of divorce cases. Apparently, in a majority of decisions (64 percent), courts, apparently, assume -- sometimes incorrectly -- that people can work out access arrangements themselves and either leave the matter of access as open, vague, or use terms such as "reasonable" or "liberal" access. At the other extreme, in only 1.1 percent of cases was access denied though in about 12 percent of cases, the intent of the courts was unclear since no mention was made in the order concerning access rights of the non-custodial parent. We believe these to be cases where the

---

93 For a particularly interesting and insightful analysis of the attempts of one court to convey the legal and moral issues surrounding compliance with maintenance orders and access, see, Andy Wachtel and Brian Burtch, Excuses: An Analysis of Court Interaction in Show Cause Enforcement of Maintenance Orders, Vancouver: Social Planning and Research, 1981.

94 For further discussion of this, see Bala and Clarke, 1981, pp. 64-67. Undoubtedly, the most extreme illustration of the reluctance of the courts to deny access is O.v.O. where, having murdered three of her children, after release from a psychiatric hospital, gave birth to three more children, subsequently divorced, but was given closely supervised access to the children who were in the custody of the father.

husband's whereabouts are unknown or, he is, at least, no longer in contact with his ex-wife and his children.

Table 5.32
Distribution of Access Orders

Type of Order	Percent
Specified arrangement	22.5
Open/vague	14.1
Reasonable/liberal access	49.8
Not specified	12.4
Access denied	1.1

The actual amount of time granted to the non-custodial parent was specified in about 28 percent of cases. Again, in two-thirds of cases, this is left to the parents to work out on their own. In less than one percent of cases was supervised access ordered and, in about 5 percent of cases, the orders set out, in extremely specific terms, the nature and amount of access available to the non-custodial parent.

Insofar as mediation is concerned, access arrangements are more likely to be specified where couples mediated their settlement than when they did not. In about 46 percent of mediation cases, access is spelled out in fairly specific terms compared to about one-fifth of non-mediation cases. This difference is, perhaps, not too surprising. Couples who seek the help of a mediator are also those in conflict about their post-divorce relationships and, in particular, matters relating to access and parenting. Thus, one outcome of mediation is that what is meant by access is set out more specifically. For example, the court records we analyzed mention specific weekends and holidays considerably more frequently when the case was mediated than whewre it was not (39 percent compared to 17 percent). And, while they are small in number (36 cases in all), access was defined in what we called "highly specific terms" in 11 percent of mediated cases but in only 5 percent of non-mediated cases.

It is apparent, then, that in the majority of cases, courts prefer not to impose access guidelines on divorcing or separating couples but to allow them to work things out on their own in ways that best suit their particular circumstances. In invoking terms such as "liberal" or "reasonable" access, there is an implication that this is the best way to encourage easy and ongoing contact between the children and both parents.

However, as we learned from clients, these terms have a variety of meanings to some and no meaning to others. In answer to the question of what was meant by "liberal or reasonable access" we received a variety of different answers (Table 5.33).

Two differences between men's and women's responses are worth noting. First, about 15 percent of women intepret these terms as giving their ex-husband license to come and take away or visit the children whenever it suits him. They, therefore, see this as a negative aspect of unspecified access terms. Husbands, on the other hand, gave this answer about half as often as women but tended to perceive this as a positive aspect of the custody provisions. Second, men show considerably more confusion and uncertainty as to what is meant by liberal or reasonable access than do women, 46.7 percent compared to 30.4 percent, respectively. However, while about 38 percent seem to view these kinds of access provisions favorably in the sense that they imply non-interference of the State in how they deal with their children, overall, some 30 percent did not appear to know what was meant by this kind of order. In sum, while the phrase "reasonable" is a useful and meaningful concept within the law, it has little meaning to people in their everyday lives. Nor do there appear to be patterned differences between mediated and non-mediated cases in this regard.

Table 5.33
Meaning of Liberal or Reasonable Access

Meaning	Wives	Husbands
Weekends	11.9	10.0
Occasional but no pattern	2.4	--
Twice a week	1.8	3.3
Non-interference in life	24.4	20.0
Up to couple	14.3	13.3
Can drop in any time	14.9	6.7
Not sure/no idea	30.4	46.7

Access in Practice

As noted earlier, non-custodial parents were denied access in only about one percent of cases. Interviews with clients, however, indicate that in about 11 percent of cases where the wife has sole custody, the father does not, in fact, have access to the children. People mentioned a combination of reasons why this has occurred including failure to pay maintenance (22%), the father has moved away (30%), he is not interested in maintaining contact with his children (55%) and the children do not want to see him (20%).[95]

---

95 Figures do not add up to 100 percent because some people gave more than one reason for lack of access. The opposite situation, where the mother is the non-custodial parent, and there is no access involves too few cases (6 in all) for it to be possible to say much about reasons for non-contact.

Where fathers do have access, the frequency of contact varies considerably but, as Table 5.34 shows, the most common pattern is for men to have access one or two days per week. Nevertheless, about one-third of fathers appear to have little or no contact with their children. The major difference when women are non-custodial parents is that slightly more than one-quarter have almost no contact with their children. This seems to be a reflection of the circumstances under which some women relinquished all parenting of their children and, in effect, turned these obligations over to the father.

Finally, women we interviewed with sole custody, indicated that the actual arrangements were different from what was initially specified or agreed to in about 38 percent of cases. Here there was a large number of cases where it was impossible for people to answer because they were, as it turned out, unsure as to what exactly were the arrangements. Where these were known, the major change is that the father does not exercise his access rights or obligations (18.4 percent) or sees the children less frequently than the court ordered (43 percent). In about one-fifth of cases, fathers see the children more frequently than was ordered by the court. Similarly, men with custody reported that where there are differences from what was ordered (37 percent), their ex-wives see the children less frequently than ordered in about 58 percent of cases. Our data do not show systematic or appreciable differences between mediation and non-mediation cases.

Table 5.34
Frequency of Contact with Children by Non-custodial Parent

Frequency of Contact	Mother has Custody	Father has Custody
Less than one day per week	19.0	16.4
1-2 days per week	34.9	24.6
3-4 days per week	9.5	6.6
Daily	2.8	4.9
Rarely or Never	12.8	26.2
Other	22.1	22.3

To summarize briefly, there is every indication that, under the previous legislation, judges were already committed to ordering or accepting access arrangements which encourage as much contact with both parents as is in the best interests of the children involved. In doing so, they have left determination of of what is most suitable for the children in the hands of the divorcing parents. However well-meaning the intention, it is nevertheless the case that for a sizeable minority of people, what all of this should mean in practice is not clear. Qualitative data from the client interviews and discussions with

court-based mediators suggest that open and vague arrangements can sometimes precipitate conflict as well as create anxiety in parents as to what is an appropriate arrangement that will minimize the impact of the divorce on the children.

In other words, the varied meanings and lack of meanings which people attach to notions of liberal and reasonable access suggest that some people could benefit from a clearer set of norms as to what is expected of them, what is, in the experience of experts, a reasonable and unreasonable level of access, given the particular circumstances and resources of the individuals involved. While such instruction and guidance is probably not an appropriate role for judges, they could encourage divorcing couples to meet with a counsellor or mediator following the court hearing. It is unlikely that any kind of access order or post-divorce counselling process can force disinterested or alienated men to live up to their parental responsibilities or to force women, hostile or afraid of their ex-spouse, to allow him access to the children. However, it does seem possible to provide some guidance and mediation for those couples mired in the logistics of attempting to maximize the children's contact with both of their parents.

PARENTING AND DIVORCE MEDIATION

Patterns of custody and access provide one indication of the impact on the post-divorce family and potential relationships between family members. Except in the sense that mediation is more likely to produce joint custody arrangements, we are unable to conclude that it has an appreciable effect in making fathers more reliable about their parenting. However, an important component of the Client Interview Study was a series of questions whose overall goal was to capture both quantitatively and qualitatively, the nature of relationships between ex-spouses and their children. In part, we were, of course, interested in the role mediation might play in strengthening the post-divorce family and, in turn, improving the situation of children caught up in their parents' marriage breakdown. But, more generally, given the size of the sample, we have a data base unprecedented in the area of family studies and which can, potentially, make a unique contribution to our understanding of the post-divorce family in Canada. The following paragraphs make no pretence to deal with these data in very much detail. Rather, they give an indication of the situation of post-divorce families and the role mediation plays in lessening conflict between divorcing and separating couples.

Relationships Between Ex-Spouses

As we look over the completed interviews and the summaries prepared by the researchers in charge of the Client Interview Study, we find anectodatal evidence of the amount of conflict and

hostility which sometimes accompanies marriage breakdown. There was, for example, the case of the woman who returned after a weekend away to find a gaping hole in her back yard where previously had stood a garage. Using, unknown kinds of equipment, her ex-husband had removed it; apparently he did not care about the house or the furniture or the children but he did want his garage. Or, there is the case of the woman who worried when a helicopter went over her house. Every time this happens she fears for her safety: her ex-husband, a helicopter pilot has threatened -- we don't know how seriously -- to drop a bomb on her and her house on one of his trips.

These are the extremes. While it would be naive to suppose that people who end their marriage are exactly happy about their ex-spouse, we do not find evidence, generally, of the kind of conflict reported in American studies (see Part II). Overall, our general sense from the interview data and the more qualitative summaries of these data, provided by the researchers, is that in no more than one-fifth of cases is there evidence of conflict and hostility between ex-spouses. Admittedly, there is, in another 20 percent of cases, indifference: the ex-spouses are not communicating with one another or one, usually the husband, has split the scene. The low level of conflict is borne out by how peope described their present relationship with their ex-spouse (Table 5.39). About 43 percent of men and 52 percent of women describe their present relationship as friendly, cordial or, at least, business-like, with respect to the children. In contrast, about 21 percent of men and 16 percent of women said that the present relationship is tense or hostile. Nor does mediation seem to have impact in the anticipated direction. In all, about 47 percent of men and women who did not use mediation describe their relationship as friendly, cordial or business-like compared to about 37 percent of those who attended mediation. Again, we must, however, keep in mind that those who chose to mediate their case were, sometimes, those who started out with the most conflict.

Table 5.35
Present Relationships With Ex-Spouse
by Sex and Mediation and Non-mediation

Relationship	Women		Men	
	Med	Non-med	Med	Non-med
Friendly	20	22	18	21
Cordial	11	14	9	15
Business-like	7	9	10	10
Distant	12	19	3	20

Table 5.35 (continued)

Relationship	Women		Men	
	Med	Non-med	Med	Non-med
Tense	7	6	7	5
Hostile	10	9	16	14
Varied	15	12	18	9
Other	18	10	20	6

On a somewhat exploratory basis, those we interviewed were presented with a list of possible problems separated or divorced couples may encounter with respect to access and post-divorce parenting.[96] The results are shown, separately, for mediation and non-mediation cases and for women and men in Table 5.36. Overall, what is apparent, is that only a minority of, on average, 13.4 percent of men and 19.7 percent of women, indicated that they were experiencing these kinds of problems. The problem cited most often by women is that the father is not dependable about visiting the children. For men, the major complaint is that the ex-wife says negative things about them to the children. There are some, but not substantial differences between mediation and non-mediation clients. On nine of the 13 items, women in the mediation group are somewhat more likely to identify the statement as applying to their situation. The net result is that those women who attended mediation are slightly more likely to perceive there to be problems than are those who resolved their case through the legal process: a difference of about three percent. Differences between those who mediated their case and those who did not form a similar pattern for men. In nine of the 13 items, a higher proportion of men in the mediation than in the non-mediation group found these items to a problem in their post-divorce relationship. The result is an average difference of about four percent over the thirteen items.

---

96 With some adaptations, these were "borrowed" from Barbara Landau's study of mediation of legal aid cases in Toronto.

Table 5.36
Problems Identified by Women and Men about Access and Ex-spouse's Parenting for Mediation and Non-mediation Cases

Problem	Women		Men	
	Med.	Non-Med.	Med.	Non-med.
Children Unhappy Spending time with non-custodial parent	22	16	15	12
Says bad things about you to the children	28	29	35	24
New partner says bad things about you to the children	8	9	12	5
No healthy foods	20	15	15	10
No proper medical care	10	6	11	9
Physically abusive to Children	7	3	6	4
Excessive use of drugs/ alcohol when with children	19	21	11	9
Verablly abusive to the children	20	17	15	12
Favours one child	41	29	17	17
Buys too many gifts for the children	19	18	16	10
Children not picked up or returned on time	31	27	19	9
Children not ready when you pick them up	12	8	22	18
Not dependable about visiting the children	33	35	14	15

On most items, differences between the mediation and non-mediation groups are not large and the conservative is that those who mediated their settlements are about as, if not more, likely to be experiencing post-divorce problems as those who used only a legal process. What is noteworthy in Table 5.40 is that, with one or two exceptions, most women and men do not appear to

be experiencing the kinds of difficulties in access and parenting these various items were intended to capture.[97]

More whimsical than methodologically sound were two questions which asked people to rate themselves and their ex-spouses as parents on a scale of one to ten. While we do not put great store in the results, it is of interest that women gave themselves an average rating just slightly over eight and their former husbands a rating of just over five. Women in the mediation group appear to have a somewhat higher regard for their ex-spouse as a parent than do those in the non-mediation group: 5.7 compared to 4.8. Men, on average, rate both themselves and their ex-spouses at just over seven and, as with women, men in the mediation group give their ex-wives a slightly higher rating than do those in the non-mediation group.

MEDIATION AND LEGAL PROCESSES

Legal Representation

The client Interview data indicate that about 70 percent of clients were represented by a private lawyer and about 18 percent by a legal aid lawyer. Predictably, women are more likely than men to have been eligible for and to have used a legal aid lawyer (25 percent compared to 10 percent). About two percent of women and three percent of men were self-represented. What is of particular interest is that in uncontested divorce cases, a majority (60.3%) of respondents in the divorce action do not show up in court and/or make no response to the divorce petition Further breakdowns by sex of petitioner reveal little difference between the two except that women, as respondents, are twice as likely as men to have been represented by a legal aid lawyer (8.4% versus 4.1% for all divorce cases).

There are slight but not significant differences between mediation and non-mediation cases with repsect to legal representation (Table 5.37) and both men and women are somewhat more likely to have used a private rather than a legal aid lawyer, the result, presumably of their somewhat better financial situation. The category of "joint lawyer" requires some explanation. This pertains particularly to Montreal where, in at least clients' perceptions, they were both represented by the same lawyer and, in some instances, actually split the legal fee between them. While, in most jurisdictions this would seem to be a breach of professional ethics, it is, apparently, not uncommon for one lawyer to represent both parties and is not, in fact, in violation of the divorce legislation.

---

97 It should be noted, however, that if the ex-spouse has no contact with the children, these items would have been coded as not applicable.

According to clients, the average cost for legal representation was $1411.00. Overall, men paid, on average, about $315.00 more than women in legal fees though this declines to about $170.00 when we exclude legal aid cases, most of whom are women. Where both were privately represented, men estimated legal fees for uncontested and contested divorce cases at, on average, $1557.00 and $3882.00, repectively. In contrast, women reported aveerage legal fees for the two types of divorce cases of $1484.00 and $3564.00. Overall, average fees are about three times as high for contested divorce cases than they are for uncontested divorce cases. In our sample of clients, the highest amount paid in lawyer fees which we were able to code was $9000.00. In general, these figures come very close to what lawyers estimated as their average fee for an uncontested divorce-- $1338.00-- though the range of fees indicated in the mail survey goes from a low of $250.00 to over $20,000.

Table 5.37
Legal Representation by Mediation and Non-mediation Cases by Sex

Representation	Women		Men	
	Mediation	Non-Mediation	Mediation	Non-mediation
Both	67	71	77	77
Husband Only	4	3	4	4
Wife Only	15	15	7	8
Neither	4	5	3	5
Joint Lawyer	8	3	6	4

Legal Costs and Mediation

One of the alleged benefits of mediation is that it reduces legal costs to divorcing and separating couples. However, our data do not bear out this contention. Women in our sample who mediated their case estimate their legal fees at an average of $1599.00 compared to $1214.00 for those who did not attend mediation, an average difference of $385.00. Men, in the mediation group estimate legal fees as having been about $508.00 higher than did those in the non-mediation group ($2019.00 and $1511.00, respectively).

It could be argued that had clients not gone to mediation, their legal fees would have been even higher. That is, people who attend mediation are generally those with matters in dispute and, should these go to litigation, the cost would be substantially higher. But, various breakdowns of the data do not allow us to reach such a . For example, in general, where clients said that no matters were ever in dispute, average legal fees are estimated at $658.00 compared to an average of $1758.00 when one or matters were at least initially in dispute. Those with "nothing to dispute" and who nevertheless attended mediation

estimate their legal fees at $937.00 compared to $627.00 for those who did not attend mediation. Where matters were initially in dispute, the mediation group estimates legal fees at $2071.00 compared to $1582.00 for non-mediation clients, a difference of $489.00. And, as Table 5.38 shows, when legal fees are broken down by clients' assessments of whether the case was contested or uncontested, they are still higher than for those in the mediation group.

Table 5.38
Estimated Average Legal Fees for Contested and Uncontested Cases by Mediation and Non-Mediation

Type of Case	Estimated Legal Fee
Contested Case:	$3156
Mediation	3305
Non-Mediation	3024
Uncontested Case:	1128
Mediation	1315
Non-mediation	1034

Impact of Mediation on Court Process

As noted earlier, most of the evidence on divorce in Canada suggests that only about 5 percent of cases are actually contested at the time of the court hearing though these are, of course, the ones which take up most of the energy and time of the family courts and which, therefore, receive most of the attention. One of the anticipated outcomes of mediation is that it will result in fewer contested cases and a faster and thereby cheaper way to resolve family law cases. As well, there is hope that changes in procedures and philosophy accompanying the Divorce Act, 1985 will also result in less adversarial approaches in family courts. Thus, considerable baseline data were collected in this research relevant to a future evaluation of the new divorce legislation. Here, we are primarily concerned with determining whether when people mediate their settlement, this has impact on court workloads and in reducing the delays most divorcing and separating couples now experience.

Whatever their initial situation, the majority of separation and divorce cases have, by the time of the court date, been turned into rather routine affairs. If there is conflict and dispute, most of this occurs prior to the court hearing. We have overrepresented contested cases and should, therefore, be presenting a picture which, compared to the actual situation, exaggerates the amount of contention. However, even though we were over-concentrating on contested cases, the four researchers, after going through the court files and noting motions, answers, counter-petitions, interim and interim-interim orders and so forth, were still only able to assess about 10 percent of cases

as either very contentious or contentious and another 15 percent as "slightly contentious". In other words, by the time the case reached court, three-quarters of them had become routine cases. Clients recall of the length of the court hearing bear out our researchers' assessments (Table 5.39). Most, (61 percent), were in court for under one hour and some 22 percent (mostly in Ottawa) never appeared in Court at all. Thus, in only about eight percent of cases was there litigation which occurred over a day or more.

Table 5.39
Length of Court Hearing for Mediation and Non-mediation Cases and in Total

Amount of Time	Type of Case		
	Mediation	Non-mediation	Total
Less than 15 minutes	54	37	41
One hour or less	23	19	20
Half a day or less	9	5	6
Full day	7	3	1
Several days	5	9	7
By Affidavit	8	27	22

Those who mediated their case tend, on the whole, to have spent less time in the court hearing than those who did not attend mediation: 77 percent of mediation clients compared to 56 percent of non-mediation clients reported that their hearing was concluded in less than an hour. At the same time, of those clients who did go to court, 36 percent of those who mediated their case compared to 31 percent of those who did not were in court more than once.

Time Between Filing and Final Settlement

Announcements describing the Divorce Act, 1985 pointed out that the new provisions with respect to grounds for divorce give the divorcing couple the option of waiting one year or, if there is adequate evidence, of obtaining a divorce immediately using one of the other indicators of marriage breakdown. Given the backlog of cases in some Canadian family courts, the term "immediate" may have to be redefined. Table 5.41 gives the total length of time between filing of the divorce petition and the granting of the decree nisi. Because there are substantial differences between the four courts involved in this study, times are shown separately for each. The outstanding situation is Montreal, where at the time of the research, contested divorce cases, on average, were taking more than two years to settle. Near the end of the data collection period, a number of procedural changes were implemented in an effort to reduce the growing backlog of cases in this massive court. While these

seemed to be working for a time, recent discussions with court personnel and lawyers suggest that the impact of these changes was short lived. There is also, for contested divorce cases, an average waiting period in Ottawa of about 18 months.

Table 5.40
Average Number of Weeks Between Filing of Petition and Decree Nisi by Research Site

Research Site	Type of Case	
	Uncontested	Contested
Saskatoon	15.0	17.7
Montreal	25.6	119.6
Ottawa	21.7	76.1
St. John's	16.9	20.7

Excluding Montreal, which is in many ways, an atypical court, it appears that, at the time of the research, those proceeding with an uncontested divorce could expect to receive a decree nisi in about four and a half months after filing of the petition (18.1 weeks, on average). Where the case was contested, the time between filing and decree nisi was, on average, about 11 months (44.7 weeks). We do not, of course, know if all of these delays are the result of court workload or of the actions of lawyers.[98]

It appears that those who choose to mediate their case face somewhat fewer delays in obtaining a court order than do those who use a purely legal route. With the exception of separation cases under provincial legislation, mediation cases, on average, were disposed of more quickly than non-mediation cases (Table 5.41). While the same pattern can be seen in all three mediation research sites, the difference is particularly noticeable in the Montreal court. For all types of cases mediation is the faster route to a court order: there is, for example, a difference of 7 weeks for uncontested divorce cases; a difference of 23 weeks for contested cases and a difference of four and 60 weeks for uncontested and contested separation cases respectively.

---

98 It appears that, generally, separation cases, those proceeding under provincial legislation, move more quickly through the courts. For uncontested separation cases the average length of time is about 10 weeks. Where the case is contested, the average is about 36 weeks.

Table 5.41
Average Number of Weeks Between Filing and Court Order
by Mediation and Non-mediation
and Type of Case

Type of Case	Mediation	Non-mediation	Total
Uncontested Divorce	17.9	19.7	19.4
Contested Divorce	69.3	84.9	82.6
Uncontested Separation	11.7	9.9	10.0
Contested Separation	21.7	39.1	35.7

Client Perceptions of the Legal Process

Over the course of our interviews, we attempted to gain insight into how people felt about going through the divorce process and, in particular, the court hearing. As would be expected, thinking about going to court and the court experience itself evoked in people a number of responses. However, as Table 5.42 shows, the experience was perceived in more anxiety laden terms for women than was the case for men. As people could give more than one response to this question, percentages do not add up to 100 percent. About 27 percent of clients experienced unexpected delays and another 17 percent said that there had been expected delays in their case. The most common effect of these delays was that they prolonged the pain, anxiety and insecurity associated with the marriage breakdown and subsequent divorce. Finally, as the responses in Table 17 should suggest, four-fifths of clients would prefer closed hearings and an equal proportion would prefer divorce by affidavit rather than a formal hearing.

Table 5.42
Feelings about the Court Hearing

Feelings	Women	Men
Confident	17	36
Prepared	6	11
Relaxed	4	7
Nervous	74	47
Scared	35	16
Angry	9	17
Insecure	14	10
Anxious	29	22

The fact that people had been to mediation seemed to have no appreciable effect, one way or another, on their state of preparedness, their sense of confidence or their state of anxiety and nervousness.

It is difficult to draw s about the overall impact of divorce mediation on the court process. We do not have direct data on the relative costs of mediated versus non-mediated cases, but anticipated that savings could be inferred, if it turned out

that mediation leads to quicker, simpler and less contentious settlements than non-mediation. The data do not allow us to make that kind of statement. Certainly, from the perspective of clients, there appear to be advantages, in terms of time, in mediating the settlement. And, as clients told us, the longer the uncertainty, the greater the pain, anxiety and anguish; most people longed for a quick settlement. When there are issues in dispute and they are not resolved in mediation so that the case becomes, in effect, uncontested, settlements take time, albeit not as long as it did for those who eschewed mediation.

But, overall, we can find little evidence that mediation saves the court time and, therefore, money. We have drawn attention to a few measures which are of direct concern to the issue of the impact of mediation on court process. There we find only slender evidence that there is much difference, from the court's point of view, between mediation and non-mediation cases. Other measures, not reported here, such as researcher's assessment of the contentiousness of the cases they examined, number of motions, counter-claims and counter-petitions etc., all indicators of case complexity, do not vary much between mediation and non-mediation cases.

In sum, mediation does not make things worse, but it is difficult to conclude, on the basis of our data, that sending more cases to mediation would appreciably affect the workloads of the courts we have studied. And, of course, the present reality is that only about three percent of cases flowing through these courts go to mediation enroute to a final court settlement. Thus, even if we had been able to observe greater differences between the two types of cases, it is apparent that, at the present level of staffing, mediation services cannot be expected to make much dent in the cost of processing family law cases or do much to reduce the chronic problem of a backlog of cases plaguing most family courts in this country.

This has been a much longer Part to the report than was initially projected. Readers are to be forgiven if, at this point, they feel they are suffering from information overload. In the final Part of this report, we attempt to pull together the findings and to comment, generally on their implications for social policy.

PART VI: SUMMARY AND CONCLUSIONS

OVERVIEW

After an extensive review of the existing research on divorce mediation, Kenneth Kressel, an "enthusiastic student of the mediation process" is forced to conclude that "mediation is a vehicle of social influence which is not inherently superior to any other method of conflict resolution. Like the others, it has its own decided liabilities as well as assets."[99] The research findings of this study lead us to a somewhat more sanguine assessment as to the benefits of divorce mediation compared to a traditional legal process. But, for at least three reasons, we would not want to challenge, forcefully, Kressel's assessment of the research findings to date. First, while it has been possible to show some differences in outcomes between mediated and non-mediated cases these differences are not always in a direction which strengthens the case for this approach. Second, and we recognize that this is a matter of opinion, the positive findings show only modest not dramatic differences between the two approaches to dispute resolution. And, finally, on a wide variety of measures we find little or no difference between mediated and non-mediated cases, to the extent that the more cautious is that we have proven the "null hypothesis" : that there is no significant difference between the "experimental" and the "control" group.

No researcher ever feels very happy when the null hypothesis turns out to be the most correct interpretation. It is a much easier task to write a report in which one can conclude, unequivocally, that the test factor, in this case divorce mediation, produces superior outcomes. Or turning it around, it at least, makes good press to be able to report that the new approach, again in this instance, divorce mediation, makes things worse for people, that all the alleged negative consequences are "really" true: women fare worse; people's rights are not protected; lawyers feel their role is undermined and so on. Proving the null hypothesis, then, creates the potential for a dull report but worse than that, makes the researchers no friends among mediators, anxious for feedback and legitimacy, or, on the other side, critics of the approach, who believe, for example, that women are better off with the safeguards built into the adversarial approach.

Admittedly, proponents and critics of divorce mediation have often made extravagant and polemical claims in support of their positions and it is naive to suppose that research will reveal differences of such magnitude as to satisfy or undermine the contentions of these opposing groups. Proponents of divorce

---

99 Kenneth Kressel, The Process of Divorce, p. 178.

mediation have not so much overstated the case for this approach as exaggerated the evils of the adversarial system. It is, for example, easy enough to single out the dreadful consequences for everyone of hotly and bitterly contested cases, particularly when the issue is custody of the children, and to conclude that "there has to be a better way." But, of course, most people ending their marriage do not become involved in such disputes. At present, there is little evidence to suggest that divorce mediation offers a panacea for these seemingly intractable disputes; rather, a number of couples eschewed the possibility of trying mediation because there was simply too much hostility. And, the overall "success rate" for the mediated cases though, certainly respectable (half to two-thirds of cases), still left 25 to 30 percent of couples in need of a court settlement or one worked out, seemingly at the last minute, through negotiation between the lawyers.

Thus, we probably should not expect there to be great differences between the two approaches particularly as, is discussed below, both mediators and lawyers will receive their share of "easy" and "contentious" cases. And, as we also conclude, we believe that this is, in part, because if there ever was a "clash of cosmologies" between lawyers and mediators, the climate of opinion has changed so that those involved in family law -- judges, lawyers as well as mediators -- are more of a piece in their overall objectives of encouraging less adversarial approaches.

From the outset of this research, we have viewed with some skepticism the claims of those concerned about the supposed negative consequences of divorce mediation. Critics have not, of course, advocated that couples should always fight things out in court. Indeed, the only argument we have ever heard in favour of litigation of family law matters (excluding property) is that some people "need their day in court", "their chance to vent their spleen" and other similar cliches. Like most cliches, this argument probably has, within it, some element of truth for some people and some situations. But, it is notable that this was an argument we heard more frequently five years ago than now. Mediation has not been criticized for its intended objectives but for the supposed unintended consequences which are products of the wider society: notably that women, oppressed and underprivileged within family structures, find themselves in the same position following the decision to end the marriage. These seemed to be concerns of a speculative nature which did not seem to be grounded empirically. Much the same seems to be true for concerns about the implications for the legal profession of the growth of divorce mediation. These seemed then, and now, concerns based on specific instances rather than any systematic investigation of the nature of mediated settlements.

In sum, failure to disprove the null hypothesis, or at least to do so in its entirety, is not so terrible a way to end the report. As the following paragraphs will show, in a wide range of areas, divorce mediation produces as good, if not better, outcomes than the pure legal process. And, contained within these outcomes is evidence that undermines the major criticisms of this approach.

SUMMARY OF FINDINGS

This study has been built around the three kinds of summative evaluations: process, outcome and social impact. Each of these, in turn, generated a number of more specific areas of inquiry and, within each, more specific questions. Some of these were speculative questions, not all of which, as it turned out, were perhaps worth asking or which could adequately be addressed in this particular project. And, it should also be noted that, while the main focus of the research has been on an evaluation of court-based mediation services and mediation, generally, we have studied this process within the context of the more general research objective of collecting and analysing baseline data on custody, access and maintenance at a point just prior to the Divorce Act, 1985 coming into force. Discussion of the issues and presentation of the data relevant to each of these areas, has occupied considerable space in this report and has, at times, eclipsed the concern with mediation. Part of the reason that this occurs is that only about three percent of cases flowing through the family courts involve divorce mediation and/or counselling. Too, as just noted, there are, more often than not, little or no differences between these minority of cases and the overall sample of separating and divorcing couples.

Social Impact Issues

We begin this summary by considering what we have referred to as social impact questions, the alleged unintended consequences of divorce mediation. As set out in the initial proposal, these fell into three distinct areas: a) impact on preservation of the family and marriage; b) impact on the situation of women (and children) and c) impact on the legal profession. In a nutshell, as we have already suggested, the fears that divorce mediation would have unintended negative consequences is largely without empirical justification.

1) Promotion of Reconcilation

The possible exception is with respect to the first of these areas of concern: the possibility that divorce mediation may be counter-productive to encouraging people to preserve and save their marriage. Here, the major concern had been that divorce mediators are, in their values and approaches, more committed to the view that divorce is, for most couples experiencing marital

difficulties, the rational alternative. Our survey of mediators and the extensive discussions with court-based mediators do not lead us to conclude that mediators are particularly biased one way or another. Overall, as we have seen, about 6 percent of couples who attended mediation, reconciled, at least temporarily. And, our observations of mediation suggest that a central question posed to most couples is whether they really do want to end the marriage. At the structural and administrative level, however, mediators within the courts are not in the business of offering marriage counselling though this is sometimes the outcome of the process. Couples who, in the view of the mediator, are not serious about ending their marriage are generally referred to other agencies. But, as more than one mediator has noted, even if one is only referring people "across the street" more than half will not follow up on the referral. Moreover, there is, in most communities, certainly the ones included in this research, a paucity of marriage counselling services or long waits to obtain an appointment. The result is that many of the cases referred out of the courts return not long afterwards as mediation cases. Mediators in private practice generally offer a wider range of services and are, in principle, freer to turn what may have seemed a mediation case into reconciliation counselling. However, it appears that few couples who begin with the desire to end their marriage are dissuaded from this decision; the more usual sequence is for couples to move from marriage counselling into divorce mediation.

In short, existing arrangements and policies within the courts are geared towards the assumption that couples do want to end their marriages and, certainly, by the time most approach a court-based service, this is a realistic assumption. But, through no fault of the mediators, these services lack the funding to offer, as an explicit service, marriage counselling. Speculatively, we would note that the change in terminology from conciliation counselling to divorce mediation, has had the effect of notifying people that this approach has little to do with attempting to save a faltering marriage. And, finally, couples who have decided to end their marriage usually are not interested, are often annoyed by, the attempts of mediators to offer marriage counselling.

2) Women and Mediation

The second of the areas of concern under the general topic of social impact, is that women fare worse, economically, when they mediate their settlements. However, as we have seen, our data indicate an opposite : on average, women do better under mediated than non-mediated settlements, a difference which holds true when we compare people at similar income levels who have and who have not attended mediation. At the same time, while these findings certainly refute the argument that women (and their children) suffer, economically, as a result of mediation, the

conclusion should not be taken to mean that mediation does all that much to reduce the economic hardships associated with marriage breakdown. Depending on the type of case, our data indicate that, on average, women who attended mediation receive about $1200.00 to $1400.00 per year more in maintenance than those who did not, an amount which does not appreciably change the proportions of women and children, who following divorce or separation, find themselves living below the poverty lines for various sizes of family.

It is, of course, only in Montreal that maintenance and property are issues likely to be mediated. And, while it does appear that women there do better than their counterparts in other mediation research sites, or to put it the other way around, men pay proportionately more of their gross incomes in maintenance, the differences are not, in our view, all that substantial. Rather, it does appear that, having entered into mediation of custody and access, people also work out somewhat better maintenance agreements than they might have otherwise.

As we have seen, in Montreal, the mediators work with fairly elaborate and well-thought out flip charts which document the income and expenses of each party. But, nevertheless, mediators cannot easily suggest a level of maintenance quantum which is much higher than what will, in non-mediated cases, be ordered by the court. Mediators, in other words, as with lawyers, work within a set of constraints which are imposed by judges' collective decisions as to what constitutes a just and equitable maintenance quantum. One indication of these constraints is that, for both mediation and non-mediation cases, amount of maintenance does not rise proportionately with the number of children to be supported. Mediators, it seems, are no more likely than lawyers to impose or request a level of maintenance which would ensure that children in large families are treated equally as children in smaller families. Clearly, as well as the policy constraints created by the courts, there is the larger constraint that, generally, there is only so much money to go around; to negotiate or to mediate a larger settlement in the case of these larger families is simply to invite default on maintenance payments entirely.

To reiterate, whether or not maintenance was actually an issue subject to mediation, women do better when they attend mediation. But, it would be unrealistic to suppose that the benefits of the mediation process could ever be such as to redress the wider inequalities between men and women: the fact is that most women, following separation and divorce will, even if employed, find themselves and their children living in an impoverished situation.

A second area of concern is that women are, increasingly, being driven into accepting joint custody arrangements against their will and when, in their view, it would be inappropriate or

undesirable, given the husband's record as a parent or his abusive behaviour to his spouse and children. There is, in the literature, the implication that such outcomes are more likely when the case is mediated than when the woman is simply represented by a lawyer. We are simply unable to find evidence to support this contention.

It is certainly the case that in all of the mediation research sites, but especially Montreal, when couples mediate their settlement, the outcome is much more likely to be joint legal custody -- and often joint physical custody -- than sole custody to the Mother. But, we do not find evidence from any of the data sources that these were decisions imposed on women. Perhaps, understandably, men seem somewhat more pleased than do women with the joint custody arrangements, a finding true for both mediated and non-mediated cases. No doubt, as most evidence on parenting suggests, men <u>think</u> that they are sharing equally in parenting but are, in fact, not carrying their full share of the load; what is true in intact families will not change completely in non-intact families. Thus, our general sense is that women, involved in joint custody arrangements, either are, in fact, the primary caretaker of the children or even where there is joint physical custody, still find themselves making most of the day-to-day decisions about the children and worrying about such things as medical and dental appointments and costumes for the Christmas concert and so forth. Their somewhat lower level of satisfaction with the joint custody arrangement seems, then, to be a result not of particular pressure -- most are glad for the sake of the children that this is the arrangement -- but of the fact that their former husbands do not parent as diligently and responsibly as they might wish. Finally, it should be noted that the related contention that men seek joint custody in order to avoid maintenance payments is also not borne out by our data; men with joint custody arrangements are among those paying the highest maintenance quanta.

Another area of concern with respect to the situation of women in mediation is the question of domestic violence and how this is dealt with in the mediation process. The concern is that behaviour which, in many people's view, should be dealt with in the criminal courts, becomes, in effect, de-criminalized when dealt with in family courts and, in particular, in mediation and/or counselling. We must admit that, to a large extent, this is an issue which has eluded us. An undercurrent running through many of our interviews with divorced and separated women was the past violence of their ex-spouses, coupled, usually with alcoholism. But, mental and/or physical cruelty was not always the legal grounds on which the divorce was based. And, in separation cases, there was no reason to raise the issue unless the woman wished to lay charges.

In general, however, we found too few cases in the mediation group to be able to say much about whether mediators are willing to mediate a case in which there is a history of violence or how they would treat such cases. The two supplementary studies do suggest that while lawyers would usually be reluctant to refer a case to mediation in which there was a history of wife and/or child abuse, mediators see this as less of a problem. As we have seen, many have previous experience in areas such as child protection and, are, it seems, more willing to treat violence as one in a constellation of problems characterizing the multi-problem family.

It is, perhaps, not surprising that we did not find many cases involving violence which were mediated. As some women made clear, because of the violence of their ex-spouse, mediation was simply beyond the realm of possibility. And, it is relevant to note here the finding that a sizeable minority of clients we interviewed (of both sexes) favour retention of fault grounds in divorce particularly where wife or child abuse has occurred. In any event, there is simply no evidence from our research to suggest that women who had been victims of wife battering, in any of its forms, were forced either into mediation or into accepting custody/access arrangements which put them and their children into ongoing contact with the offender.

3) Impact on the Legal Profession

In this research we have been particularly sensitive to the apparent concerns of the legal profession about possible consequences of mediation for protection of people's rights and its impact on the role of the lawyer in the separation and divorce process. The first of these concerns centres on lawyers' views that because mediators are not usually trained in law, there is a risk to clients if the mediator begins to play the role of "barrack room lawyer." Thus, at the time this research began, the prevailing view was that mediators should stay away from financial and property matters and confine themselves to matters of custody and access. A related concern is that the role and obligation of lawyers to their clients becomes unclear when the case is being mediated or they are presented with a draft agreement reached in mediation. And, of course, there has been concern about the impact of this alternative on the livelihood of family law practitioners.

As with other social impact issues, it was difficult to track down the specific sources of these concerns and we found ourselves, once more, "chasing phantoms", concerns and allegations apparently not based in empirical data. In any event, our observations in the court, interviews with family law practitioners, the results of the mail survey and client recollections of the relationship between the mediator and their lawyer all lead us to conclude that, at this point, there appears

to be a relatively good relationship between the two professions and little concern about mediators overstepping the bounds of their expertise or producing technically incorrect or inequitable agreements.

While most lawyers do not believe mediators to be well-trained in family law, the majority of those surveyed believe that mediation should encompass maintenance as well as custody and access. Our sense was that not too many lawyers had experience with clients who had been to mediation but nevertheless saw their appropriate role to be one of reviewing the final settlement to ensure its legal status. Few saw this as posing a problem or as, in any way, undermining their role. From the opposite point of view, what mediators and clients both told us, suggest that mediators are very cautious about advising clients to seek legal counsel. This is also true in Montreal where there is a lawyer attached to the service. And, if anything, mediation would seem to have a positive impact on the livelihood of the legal profession. Those who mediated their cases paid somewhat more in legal fees than did the general sample of divorcing and separating couples and were as likely to be represented by a lawyer at the time of the court hearing.

In short, if there are members of the legal profession concerned about the possible negative consequences of divorce mediation, they did not choose to respond to our survey or are not practicing in the research sites included in this study. In general, most of the lawyers we interviewed and surveyed are mildly predisposed in favour of the notion of mediation though, in practice, few are referring cases to mediators in their jurisdiction and even fewer have an interest in doing mediation themselves.

General Outcomes

The preceding discussion of social impact has set out some of the outcomes of divorce mediation, particularly with respect to maintenance and custody. This section summarizes general outcomes of mediation under two basic area: 1) impact of mediation on court process and 2) impact of mediation on clients and children.

1) Impact on Court Process

The questions we addressed in this area centred on whether mediation has, as a general outcome that it reduces court workloads and, through achieving non-adversarial and more long lasting settlements, reduces court costs and through better compliance with maintenance orders, creates other kinds of savings to the state.

Perceptions of mediators, and to some extent, lawyers is that mediation does have the effect of reducing the number of contested cases, the minority of cases which take up such an inordinate amount of court time. As well, some of the clients we interviewed were also of the opinion that had they not attended mediation, their case would have been contested and would probably have involved a long court hearing. We don't know how accurate is this latter perception. Court records and client interviews indicate that from 25 to 35 percent of clients who mediated their case were involved in what was regarded as a contested case. This would seem to suggest that the majority of who attended mediation ended up with a settlement which translates into a consent order for separation cases or an uncontested divorce. But, it is difficult to say what would have happened to these cases without mediation; there are no grounds to assume that all would have been contested cases since some who go to mediation do so to finalize an agreement or for reassurance that what they propose to do is legally and morally correct. In short, we are not convinced that it is possible to demonstrate that mediation does reduce the number of contested cases or, at least, that it does so any more effectively than attempts at negotiation between lawyers.

Nor have we been able to demonstrate that, overall, mediation reduces court workloads and the amount of time required for court hearings. While the vast majority of mediation cases involved less than an hour of court time, this was also true of non-mediated cases. Indeed, it is these cases, many of which required under 15 minutes of court time, which could and will, probably, be dealt with by affidavit in future. There is, on the other hand, a slightly greater tendency for mediated cases to have involved a day or more of court time and more than one hearing than was true for non-mediated cases. This is not too surprising: if a settlement could not be reached in mediation,the case was probably highly contentious and we would expect it to use up considerable court time.

There is, however, reason to believe that mediation reduces the likelihood of couples returning to court to enforce or vary an order and results in fewer delays in reaching a settlement. The first of these outcomes has obvious cost benefits to the courts. The second, while perhaps making court administrators feel better, has its major impact on clients who find delays not only frustrating but as also usually contributing to the pain and anxiety associated with separation and divorce.

At the time of our monitoring of cases, too few had returned to the smaller courts for us to draw s one way or another about the impact of mediation on creating longer lasting settlements. The exception is Montreal where, because of the size of the court, we could do a comparative analysis. In the short run -- six months to a year after the court order -- the results are

dramatic: less than four percent of mediated cases compared to 17 percent of non-mediated cases have returned to the court for variation or enforcement of an existing order. And, more careful examination of the mediation cases indicates that in one or two of the cases, mediation had occurred after a divorce had been granted by the court but the couple were still in disagreement about custody and access.

The second important difference with respect to court process is that, whatever the status or type of case,people who attended mediation get a quicker settlement than those who do not. As noted above, length of time between filing and final settlement does not seem to have cost implications for the court since, however long the time between, the actual court hearing may be quite short. But, quicker settlements do matter to clients and may mean that they leave the system with a less jaundiced view of the legal process.

Having noted these two qualifications, the general indicated by our data is that the impact of divorce mediation on court process and court costs is fairly negligible. This is especially so given the extremely small proportion of cases which are actually mediated in any of the courts. Nor are we convinced that massive expansion of court-based mediation services would result in dramatic savings in court time and court costs. This is not to suggest that mediation is not effective in reaching non-adversarial settlements but rather to keep in mind the apparently legitimate claim of family law practitioners that they, too, are effective in this regard. Indeed, as noted in Part 4, aside from the benefit to clients of reaching settlement prior to the court hearing, there are, generally, financial incentives for lawyers to negotiate rather than litigate; most would prefer to deal with many simple uncontested divorce cases than a few heavily contested cases.

Depending on whether one thinks the "glass is half empty or half full," compliance with maintenance orders was, at the time of our interviews relatively high. According to those we interviewed, about one-quarter of these orders were in default while in about half of the cases payments were sometimes late or irregular. Taking all research sites into account, there did not appear to be differences between mediated and non-mediated cases in the likelihood of compliance with the order. These overall figures do mask the fact that, in Montreal, clients who mediated their case report a considerably higher rate of compliance than do those who did not attend mediation. This is an important finding because of the three research sites, the Montreal service is the only one to mediate financial matters.

2) Impact on Clients and Children

As much of the discussion in Part 2 of this report was meant to convey, the main rationale for divorce mediation lies in its potential to create more amicable settlements, better post-divorce relationships and, in turn, protect the interests of children. Overall, a majority of clients were satisfied with the terms of their settlement and it did not seem to make much difference whether or not this was achieved through mediation. Most who did attend mediation were highly satisfied both with the mediator and the mediation process and would recommend mediation to others in a similar situation. At the same time, most clients were also satisfied with their lawyer and the legal service provided. As far as the court hearing was concerned, a majority recalled that they had been anxious, nervous and so on. Mediation did not appear to result in people being less apprehensive or more prepared for the court hearing.

In terms of access arrangements, the main complaint by women was their ex-husbands were not living up to the agreed upon access arrangements and were, in general, seeing the children less often than was agreed to or ordered by the court. Men who attended mediation were somewhat more likely to be living up to the agreement and where arrangements had changed, the change was more likely to be in the direction of the father having more contact with the children when the case had been mediated. While some women reported that their ex-spouse had no access to the children, we did not encounter men who were being denied access by their ex-wife.

Taking into account a variety of different questions concerning parenting and access, there appears to be a slight but systematic tendency for men in the mediation group to be more involved in parenting of the children including discussing matters affecting the children, sharing responsibility, spending extra money on them beyond maintenance and so forth. While men gave a somewhat more favorable picture of their parenting involvement than we received from women (not always their ex-wives) both sets of perceptions of the father's parenting are more favorable in the mediation than in the non-mediation group. And, women in the mediation group generally rated their ex-spouses higher as parents than did those in the non-mediation group.

In general, we find in our sample of divorced and separated couples, a lower level of conflict than has been reported in a number of American studies and, at the same time, a relatively high degree of commitment by both to their parenting responsibilities. There are not, then, dramatic differences between the mediation and non-mediation couples though where there is conflict, it tends to be higher in the former than the latter. This is not necessarily a condemnation of divorce

mediation. Our measures only picked up conflict if the former spouses were sufficiently in contact with one another to argue about access and parenting. More of the couples in the mediation than in the non-mediation group were involved in the difficult task of working out the practicalities of a joint custody arrangement and it was, in fact, these couples who expressed the most desire for post-divorce/separation counselling or mediation.

CONCLUSIONS AND DISCUSSION

Proponents of divorce mediation will, undoubtedly, argue that the finding that there are not substantial differences in outcomes does not, in and of itself, undermine the case for this approach. The argument here, is one we have mentioned at several points in this report. This is that had the clients who attended mediation not done so, outcomes would have been much worse; those in need of mediation are those most in conflict. Lawyers -- goes the argument -- have a high success rate in avoiding litigation because they get the "easy" cases. Negotiation, in other words, works when there are no fundamental disputes and there is emotional acceptance of the marriage breakdown.

We have considerable sympathy with this argument and have, in the course of analyzing and thinking about the data, attempted to find ways to demonstrate how things might have been had the couples in our mediation group not used this approach. At this point, we have, in main, been unsuccessful in doing so. Certainly, many clients told us that working things out with the help of a mediator allowed them to avoid what they envisioned as a bitter and hostile dispute. But, these are retrospective assessments based, perhaps, in a stereotype of lawyers. We have no way of knowing whether sympathetic lawyers might have been equally successful in reaching a settlement and, at the same time, minimizing the amount of bloodshed. While a more microscopic and more qualitative analysis of our data might reveal essential ways in which couples who go to mediation differ from those who do not, we are not confident that such differences will become apparent or at least will not do so without the use of a very different kind of research design.

Indeed, our data give slender support to the opposite argument: those who agree to mediate their settlement are among the more reasonable members of the population of separating and divorcing couples. As we have seen, those who opted for this approach, did seem to do so for fairly rational and responsible reasons; some were looking for a more "civilized" way to end their marriage than they perceived would be the situation if they used the legal system only, while others quite clearly were concerned about minimizing the impact of the marriage breakdown on the children. And, given that those in the mediation group are somewhat more affluent and better educated than those in the non-mediation group, our data suggest, if anything, that the cards

may be stacked in favour of divorce mediation. But, the first of these observations is based on case data which is not borne out by our more systematic quantitative data. And, in and of itself, the fact that those in the mediation group are of a somewhat higher socio-economic status does not imply that the breakup of their marriage was any less contentious than those in lower socio-economic groups.

It is, in this context, of relevance, that both lawyers and mediators view most separation and divorce cases as, in one way or another, initially contested cases. In their collective experience, it is rare for a couple to end their marriage with no matters in dispute even though this may be what they believe at the outset. In other words, it appears that both lawyers and mediators receive a mixed bag of cases which range along a continuum from no serious dispute to intractable disputes. Our data do not point to obvious ways in which some couples who used a purely legal approach might have benefitted from mediation or, alternatively, what kinds of cases are probably unmediable or unnegotiable and can only be resolved in the courtroom or through a custody investigation.

We began this concluding Part by noting that existing research has not shown that there are clearly demonstrable differences between divorce mediation and other approaches to resolving the problems associated with marriage breakdown. Our data suggest that in most respects, outcomes of mediation are as good, and sometimes better, than what occurs in the strictly legal process. And, these same data do undermine the concerns of critics of this approach. That there are not larger differences between mediation and non-mediation we attribute to the fact that we are no longer comparing a new approach against a traditional adversarial system. As we have argued, there has, in recent years, been a general shift away from adversarial approaches on the part of judges but also those who practice family law. And, it may be that those going through the uncoupling process are also a changing group, one which is more aware of the consequences for children of a bitter dispute. Mediation offers a rational way to resolve the issues of separation and divorce but it is no longer an approach which is radically different in its goals and philosophy than the legal alternatives.